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ABSTRACT

Section A of the Media and Law section of the proceedings contains the following nine papers: "RICO and the First Amendment: Racketeering Laws Threaten Free Expression" (Matthew D. Bunker and others); "Press Coverage of the Federal Appellate Courts: Technology and a Shared Notion of Newsworthiness" (Rebekah V. Bromley); "The Evolution of Illinois Defamation Law over 102 Years" (Steven Helle); "Press Shortcomings on Commentary on the 2 Live Crew Obscenity Ruling" (Linda Lumsden); "Playing with Fire: An Historical and Legal Analysis of Cross Burning from the Scottish Highlands to St. Paul, Minnesota" (Linda Lumsden); "The Impact of 'Leathers v. Medlock': An Analysis of the Law of Media Taxation" (Cathy Packer); "The Mortgage Redlining Controversy: 1972-75: National People's Action Takes on the Lenders and Wins Anti-Discrimination Legislation in Congress. A Case Study in Social Problems and Agenda Building: The Role of Reformers, Lawmakers and Media in Public Policy Making" (Kirk Hallahan); "Violations of Open Meetings Laws: Statutory Provisions and Courts' Enforcement" (Milagros Rivera-Sanchez); and "A Content Analysis of Pre-Trial Crime News Stories' Violations of the American Bar Association's Fair Trial-Free Press Guidelines" (Maria B. Marron). (RS)

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RICO AND THE FIRST AMENDMENT:
RACKETEERING LAWS THREATEN FREE EXPRESSION

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RICO AND THE FIRST AMENDMENT: RACKETEERING LAWS THREATEN FREE EXPRESSION

Introduction

Congress passed the Racketeering Influence and Corrupt Organizations Act ("RICO") to strike at the heart of organized crime: gambling, drugs, prostitution, and other criminal enterprises that prospered despite general criminal laws. RICO allows prosecutors to seek additional penalties when they can establish a pattern of criminal enterprise. The legislative history of RICO makes clear its intent to cripple organized crime. And, by extension, it also makes clear the intent of various states that modeled statutes after the federal RICO legislation.

The original contours of the RICO laws have been stretched considerably since the laws were enacted, touching in some cases speech and expressive actions -- some political in nature -- normally sheltered by the First Amendment. In the case of obscenity, RICO laws are being used to attack multiple offenders who can be certain they are violating obscenity laws only after a court has ruled the specific material legally obscene. Use of RICO in obscenity prosecutions may significantly chill forms of expression that are controversial or socially unpopular, but not necessarily legally obscene. RICO laws also have been used to suppress anti-abortion protesters who have organized to commit acts of civil disobedience -- political expression

about a controversial public issue of the kind normally afforded a high degree of First Amendment protection. Finally, RICO laws have been raised in conjunction with state computer crime statutes to create severe penalties that arguably could hamper the newsgathering process and the ability of the media to function as a check on government. While this last RICO threat is speculative, it should raise concerns as more and more government information -- some of which could be the subject of leaks and whistleblowing -- is held in computers.

This paper will look at the development of RICO and its implications for obscenity prosecutions, civil disobedience, and computer crime. The paper will conclude that RICO is being used in ways not envisioned by its drafters that may threaten free expression under the First Amendment.

The Development of RICO

RICO was enacted as Title IX of the Organized Crime Control Act of 1970. Congress sought through RICO to limit the influence of organized crime, particularly on legitimate businesses and unions. The stated intention of Congress was "to seek the eradication of organized crime in the United States . . . by establishing new penal provisions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[1] Federal RICO violations are punishable by a fine, a maximum prison term of 20 years, or both, in addition to

the penalties for the underlying crimes making up the RICO offense. But these enhanced penalties are only part of the statutory scheme. The truly revolutionary penalties provided by RICO allow courts to order forfeiture of both property involved in and proceeds derived from a RICO violation.[2] Moreover, judges can use their equitable powers, including injunctions, to prevent the convicted RICO defendant from committing future violations.[3]

Federal prosecutors are not the only people who can bring RICO to bear. The statute permits "[a]ny person injured in his business or property" as a result of a RICO violation to file a civil suit.[4] Successful private plaintiffs can recover triple the amount of damages they have suffered as a result of the RICO violation, as well as court costs and legal fees. One 1985 study of civil RICO cases found that less than 10 percent of 270 cases studied involved activities "of a type generally associated with professional criminals."[5]

A number of states have adopted racketeering laws based on the federal RICO statute. According to one study, 27 states have passed statutes patterned on RICO since 1970.[6] These state laws are generally referred to as "RICO" statutes as well, although the formal titles may vary.

One of the most controversial aspects of RICO has been its use in situations critics regard as vastly different from those seemingly envisioned by the statute's drafters. Far from limiting RICO to true infiltration of legitimate enterprises by organized crime, courts have allowed

aggressive prosecutors and private plaintiffs to invoke the statute in a wide variety of cases completely unrelated to "the mob."[7] This expansive interpretation of RICO is based in part on the way the statute is constructed. "[B]ecause Congress could not sufficiently define organized crime, it made a person's *conduct*, not one's association with a particular enterprise, the object of RICO's prohibitions. By its terms, therefore, RICO applies to enterprise criminality -- patterns of unlawful conduct by, through, or against an enterprise."[8]

In order to trigger RICO's arsenal of remedies, a defendant must commit what the RICO statute calls "predicate acts."[9] Predicate acts under federal RICO run the gamut from murder to gambling. The federal statute provides that a person who commits two predicate acts within ten years of each other may be subject to sanctions under RICO.[10] A number of state RICO statutes have similar provisions.

RICO and Obscenity

The use of federal and state racketeering statutes in obscenity prosecutions has troubling First Amendment implications. The government can use RICO to seize the property of booksellers, videotape dealers, and other purveyors of communicative materials based on convictions under state obscenity laws.[11] Even if materials found to be

obscene constitute a small fraction of the defendant's inventory, RICO prosecutions can lead to wholesale forfeiture of both business and personal holdings, as well as the other extraordinary sanctions available under RICO. The existence of these devastating penalties can only be assumed to have a chilling effect on those who create and sell communicative materials.[12]

Prior to 1984, obscenity violations were not "predicate acts" for the application of federal RICO. Congress's 1984 amendment to RICO, proposed by Senator Jesse Helms, extended the list of predicate offenses to include obscenity violations.[13] According to one commentator, 19 states have also made obscenity offenses grounds for racketeering charges under state law.[14]

The United States Supreme Court has consistently held that obscene materials are not protected by the First Amendment. The difficulty has always been discovering where protected speech leaves off and unprotected "obscenity" begins. In the 1973 case of *Miller v. California*[15], the Court set forth its famous three-part test for determining what constitutes obscenity. The *Miller* Court established the following guidelines for jury determination of obscenity:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[16]

As the *Miller* definition demonstrates, the line between what is obscene and what is protected speech under the First Amendment is an uncertain one at best, particularly when left to the discretion of local juries. With the threat of extraordinary RICO sanctions as well as more traditional penalties for distribution of obscene material, booksellers and others may increasingly engage in self-censorship for fear of being found on the wrong side of that nebulous line.

The Supreme Court's only review of the First Amendment implications of RICO as applied to obscenity violations came in the 1988 case of *Fort Wayne Books, Inc. v. Indiana*.[17] In *Fort Wayne*, a unanimous Supreme Court held that a pre-trial seizure under the Indiana RICO statute of allegedly obscene books and films violated the First Amendment when there had been no judicial determination that the materials were legally obscene. But a divided Court upheld the constitutionality of obscenity violations as predicate offenses under RICO.[18] Justice White, writing for the majority, acknowledged that stiff penalties under the Indiana RICO law might have a chilling effect on First Amendment freedoms, but held that such an effect did not render the law unconstitutional. "It may be true . . . that some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves," White wrote. "The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents."[19]

In a sharp dissent from that portion of the Court's holding, Justice Stevens, joined by Justices Brennan and Marshall, decried the use of obscenity violations as predicate acts under RICO. Justice Stevens expressed concern that Indiana's RICO act not only converted two obscenity misdemeanors into a felony with a possible eight-year prison term, but allowed the state to "close the entire business, seize its inventory, and bar its owner from engaging in his or her chosen line of work."[20]

The First Amendment, Justice Stevens wrote, should protect communicative enterprises, such as book and video stores, to a greater extent than other business ventures. For example, a hardware store or pizza parlor being financed by organized crime is qualitatively different than a bookstore that makes money through the sale of obscene books. Communicative materials are presumptively protected by the First Amendment, Justice Stevens wrote. Moreover, in the case of the hardware store or pizza parlor, prosecutors "have no interest in deterring the sale of pizzas or hardware. Sexually explicit books and movies, however, are commodities the State does want to exterminate."[21] Allowing obscenity violations to be used to invoke RICO "promotes such extermination through elimination of the very establishments where sexually explicit speech is disseminated."[22] The often unclear line between what is protected under the First Amendment and what is obscene requires that "sensitive tools" be used to regulate obscenity, Justice Stevens wrote.

While the Supreme Court's *Fort Wayne* majority did not decide the constitutionality of post-trial RICO forfeitures, at least three cases decided by federal appellate courts since *Fort Wayne* have upheld the constitutionality of RICO forfeitures in obscenity cases. For example, in 1990 the U.S. Court of Appeals for the Fourth Circuit approved RICO penalties in *U.S. v. Pryba*.[23] In *Pryba*, the first federal RICO prosecution in which obscenity violations constituted the predicate acts, the Fourth Circuit upheld the constitutionality of both a prison sentence and extensive fines and property forfeitures against the owners of a chain of adult bookstores and video rental shops.[24] The Fourth Circuit distinguished *Pryba* from the classic prior restraint case of *Near v. Minnesota*,[25] in which the U.S. Supreme Court struck down a perpetual injunction on publication against a Minnesota newspaper found to have printed defamatory news stories. The Fourth Circuit reasoned that because obscenity, unlike news, is not protected First Amendment speech, *Near* "sheds no light on the issues before us."[26] The Fourth Circuit also rejected the argument that seizing non-obscene materials along with materials found to be obscene violated the First Amendment. "The defendants may not launder their money derived from racketeering activities by investing it in bookstores, videos, magazines and other publications," the appellate court wrote. "Carried to its logical end, this reasoning would allow the Colombian drug lords to protect their enormous profits by purchasing the New York Times or the Columbia Broadcasting System."[27]

In *Alexander v. Thornburgh*,[28] the U.S. Court of Appeals for the Eighth Circuit in 1991 approved the RICO forfeiture of the defendant's "profits, real estate, and businesses directly related to" the sale of magazines and videotapes found to be obscene. The Eighth Circuit rejected arguments that federal RICO's forfeiture provisions violated the First Amendment by operating as a prior restraint on speech and by creating an unconstitutional chilling effect on First Amendment rights. The appellate court agreed with the *Pryba* court that even though protected, non-obscene materials were forfeited when the businesses were seized, the RICO forfeiture was constitutional. The Eighth Circuit also held that RICO's chilling effect on the sale of protected materials was not enough to warrant striking down RICO as unconstitutional.

The Seventh Circuit reached a similar conclusion in 1990 in *Sequoia Books, Inc. v. Ingemunson*,[29] although the court distinguished forfeiture under Illinois RICO law from forfeiture under federal RICO. In *Sequoia*, the court upheld the forfeiture provisions of the Illinois RICO statute against a First Amendment challenge from an adult bookstore. The Seventh Circuit pointed out that the Illinois statute did not allow for unlimited forfeiture of business assets once the predicate obscenity offenses were found, as did federal RICO. Rather, the Illinois law allowed forfeiture of property "only to exactly the degree that [defendants] profited from that crime economically or to the degree they used property to effectuate that crime."[30] As a result, the

Seventh Circuit found the Illinois statute constitutional as applied to obscenity violations.

RICO sanctions for obscenity violations represent an enormous threat to free expression. These draconian penalties, which can strip a defendant of business and personal assets, could create a tremendous movement toward self-censorship by owners of businesses dealing in communicative materials. Much in the way of protected expression may not find its way into the marketplace of ideas if creators and sellers fear the terrible power of racketeering statutes -- as well as the stigmatizing label "racketeer" -- that may be brought to bear if prosecutors decide the line of protected speech has been crossed. "To avoid this death penalty on their businesses, cautious businessmen [and women] are likely to avoid any works which may be considered by anyone to be obscene, harmful to minors, or simply controversial."[31]

RICO and Civil Disobedience

The number of anti-abortion protests and resulting arrests grew dramatically when Operation Rescue[32] moved into Wichita, Kansas during the summer of 1991. Doctors and staff at women's health clinics have increasingly responded by looking to civil actions under RICO[33] as a new line of defense where other legal challenges have failed.[34]

State criminal prosecutions for trespassing usually provide only small fines and short jail sentences[35] and often fail to deter protesters from blocking entrance to the clinics again.

RICO's purpose, as originally contemplated, was to fight the infiltration of legitimate businesses by organized crime, but Congress worded the statute broadly enough that it has been extended to those who commit the crimes listed in the predicate acts, regardless of motive. The threat of trespass and the potential for disruption of services forces clinics to spend money on security personnel and other measures to enable them to remain open, which qualifies as extortion under the statute.

RICO's first subsection[36] describes an "enterprise" subject to the statute's criminal provisions as one that derives income "from a pattern of racketeering activity..." As noted above, a "pattern" consists of a minimum of two acts committed within a ten-year period,[37] requirements that, taken together, are clearly designed to reach the intricate financial dealings of organized crime, not two consecutive weekend protests at abortion clinics.

A key issue raised by the civil application of RICO to anti-abortion protesters is whether Congress intended the statute to cover activity without economic motive. The U.S. Supreme Court has never considered the issue, but the Second, Seventh, and Eighth Circuits have found such a requirement.[38] In upholding the convictions in *U.S. v. Anderson*, the Eighth Circuit applied the economic motive

standard to two county administrators convicted of 28 counts of fraud in connection with the misappropriation of county funds through kickback schemes arranged with county suppliers and contractors over a period of several years. In *U.S. v. Ivic*, the defendants were terrorists who supported Croatian independence.[39] The group was involved in the planning of a number of criminal activities in and around New York City from a base in the upstate village of Dobbs Ferry. Police surveillance and subsequent searches yielded evidence of plans to bomb the Yugoslav Consulate and a travel agency specializing in travel to the Balkans, and assassinate a moderate Croatian-American journalist. The Second Circuit dismissed the RICO count, while upholding the convictions, citing lack of proof of a financial motive.

The Third Circuit, however, has not applied an economic motive requirement.[40] In *Northeast Women's Center Inc. v. McMonagle*, the RICO claim arose from trespass, injury and property damage in connection with four invasions of a women's clinic by large groups of anti-abortion protesters. The case is one of two only abortion protest-related RICO appellate decision, and the only one in which an economic motive was not required. The *McMonagle* court upheld the RICO convictions.

Another key issue raised by the use of the racketeering statute against vocal protesters is whether the First Amendment precludes the use of RICO against abortion opponents. Civil RICO raises substantial overbreadth

concerns, and contains the potential for a "chilling effect" on speech.

The First Amendment protects calls for others to take action[41] including picketing and leafletting.[42] Even expression designed and intended to offend is protected.[43]

The overbreadth question is raised when, in addition to prohibiting activities that may be punished, a statute also impinges on activities protected under the First Amendment.[44] A "chilling effect" on speech may descend when peaceful protesters may be afraid to protest due to the possibility of facing a RICO action despite the First Amendment.[45]

A bill currently before Congress, H.R. 1717, sponsored by Rep. William J. Hughes, D-N.J., would reform RICO by tightening the requirements for its civil application.[46] The move, supported by the American Bar Association, would create a judicial screening process to examine civil cases filed under the statute and dismiss those that do not meet a standard of "egregious criminal conduct."[47]

Other tactics used, with varying degrees of success, to strike back at anti-abortion protesters have included injunctions followed by fines for contempt for disobedience, and Sherman Antitrust suits for damages.[48]

RICO and computer crime statutes

Another legal area in which RICO laws arguably could chill First Amendment values involves computer crime statutes. The amount of information held in computers has increased dramatically in the last decade.[49] Because the integrity and confidentiality of computerized data is so important to fair and effective business and government, numerous computer crime statutes have been enacted to protect information held in computers.[50] But these computer crime statutes also potentially threaten another important social institution -- effective news media that depend on access to government information to serve as a check on abuses by government.[51] Such statutes, which make violating computer security a criminal offense, have the potential to chill the newsgathering process because sources who unlawfully use computer information are subject to more severe penalties than they would be if the records existed only in paper form.[52] In addition, reporters who accept information unlawfully taken from government or business computers could find themselves accomplices to a violation of the law and subject to the same penalties.[53]

Prosecutors can use violations of computer crime and security laws to invoke RICO in several states. At least one state -- Florida -- has threatened a RICO seizure suit in a minor corporate espionage case against a news organization as a result of criminal actions against two of its employees.[54] That case, in which a state law enforcement agency threatened to confiscate a major market television station worth tens of millions of dollars,

involved the unlawful telephone access of one television station's computer by a former employee.[55] The Florida law, however, is not limited to unlawful access to private computers; it applies equally to government systems.[56]

The Florida case arose when an employee of WTSP-TV in St. Petersburg, Florida, used a private telephone access password to enter the computer of a former employer, WTVT-TV in Tampa, Florida. The employee, at the behest of a station co-worker, obtained access to WTVT's computer systems on subsequent occasions. WTVT personnel detected the unauthorized access to their computer systems and notified authorities, who traced the calls placed to the computer.

State prosecutors charged two WTSP employees, Terry Cole and Michael Shapiro, under the Florida Computer Crime Act. Both pleaded no contest to the charges and were placed on five years probation. In addition, Chief Assistant State Attorney Chris Hoyer threatened to invoke the state RICO law, which specifically recognized computer-related crimes. Under the RICO statute, the state could file suit to seize the assets of WTSP as a result of the charges against the two employees.[57]

Faced with the prospect of a RICO suit against the station, WTSP officials agreed in May 1989 to pay the state $750,000 to settle the case. Under the agreement, the station would give $400,000 to the state victim assistance program, pay the State Attorney's Office $100,000 toward the cost of the investigation, and produce and air $250,000 worth of public service announcements.[58]

While the facts in this particular case do not involve the newsgathering process, the law could be applied equally in the case of a government worker taking information from a government computer without authorization and passing it to a member of the news media. In such an instance, the reporter would become an accomplice to a violation of the computer crime statute. If that reporter shared that information with an editor who asked that more information be obtained from the same source, a pattern of criminal behavior could be alleged that would invoke RICO.

Under this reasoning, at a time when more and more government information is held in computers, government sources who disclose information, for whatever reason, run the risk not only of criminal sanctions under computer crime statutes, but also could be subject to the harsh penalties of RICO. Likewise, reporters who took information from such sources on more than one occasion would place themselves and their news organizations within reach of the racketeering laws. Arguably, these potential dangers could cut off a vital source of information for the media and lead to self-censorship that could chill the newsgathering process

Conclusion

The application of RICO statutes to activities so closely related to free expression and the newsgathering

process is a threat to First Amendment values. RICO, designed to eliminate the taint of organized crime from legitimate enterprises, has been employed in contexts far from the intentions of its drafters. As used in obscenity prosecutions, civil disobedience, and computer crime, the statute may, in some instances, chill expression that deserves protection.

Courts have used the economic motive requirement to determine whether RICO should be applied in several non-First Amendment cases. In the First Amendment realm, such a distinction could help prevent the racketeering laws from being applied in some instances. But this protection does not go far enough because many enterprises traditionally protected by the First Amendment are economically motivated.

The solution would seem to lie with the legislatures, which need to revisit the racketeering laws and rewrite them as necessary to ensure that they are not used in ways that silence constitutionally protected expressive activities. Only when RICO is returned to its original intent of applying additional pressure to organized crime will the First Amendment's guarantees be effectively safeguarded.

NOTES

1. Statement of Findings and Purpose,, Organized Crime Control Act of 1970, Pub.L. 452, 1 U.S. Code Cong. & Admin. News 1073 (1970).

2. 18 U.S.C. 1963.

3. 18 U.S.C. 1964.

4. *Id.*

5. Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 55 (1985).

6. Melnick, A "Peep" at RICO: *Fort Wayne Books, Inc. v. Indiana* and the Application of Anti-Racketeering Statutes to Obscenity Violations, 69 Boston U.L. Rev. 389, n.4 (1989) (hereinafter A "Peep").

7. *See, e.g.*, Califa, RICO Threatens Civil Liberties, 43 Vand. L. Rev. 805 (1990).

8. A "Peep", *supra* note 6, at 392-93.

9. 18 U.S.C. 1961.

10. *Id.* at subsection 5. While two predicate acts are required under the federal statute, the Supreme Court has held that a mere allegation of two unrelated acts is not sufficient to establish the "pattern of racketeering activity" required by RICO. H.J. Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893 (1989). *See generally,* Nicks,

H.J. Inc. v. Northwestern Bell Telephone Co.: The Supreme Court Redefines the RICO "Pattern" Requirement, 64 Tul. L. Rev. 1718 (1990).

11. *See, e.g.*, A "Peep", *supra* note 6; Marin, RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores, 43 U. Miami L. Rev. 419 (1988); Note, RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment, 56 Fordham L. Rev. 1101 (1988).

12. *See, e.g.*, Philips, Artists Fear Racketeering Prosecution, Los Angeles Times, Nov. 1, 1990, at part F, pg. 1, col. 6.

13. 18 U.S.C. 1961.

14. A "Peep," *supra* note 6, at 393 n. 26.

15. 413 U.S. 15 (1973).

16. *Id.* at 24, quoting Roth v. United States, 354 U.S. 476, 489 (1957).

17. 109 S. Ct. 916 (1988).

18. The majority explicitly declined to consider whether post-trial RICO remedies such as forfeiture violated the First Amendment. *Id.* at 928 n. 11.

19. *Id.* at 925-26.

20. *Id.* at 933.

21. *Id.* at 939.

22. *Id.*

23. 900 F.2d 748 (4th Cir.), *cert. denied*, 111 S.Ct. 305 (1990).

24. Dennis Pryba, one of the owners of the corporations involved, received a three-year prison sentence. His wife

and co-owner, Barbara Pryba, and Jennifer Williams, an officer of the corporation, both received suspended sentences. The corporations, the Prybas, and Williams were also fined hundreds of thousands of dollars. *Id.* at 752. Corporate assets taken over by the government included "corporate stock, inventory including books and tapes that [were] not obscene, bank accounts, automobiles, even office furniture." Obscenity and RICO, The Washington Post, October 17, 1990 at A24.

25. 238 U.S. 697 (1931).

26. 900 F.2d at 755.

27. *Id.*

28. 943 F.2d 825 (8th Cir. 1991).

29. 901 F.2d 630 (7th Cir. 1991).

30. *Id.* at 637.

31. Amicus Brief of American Booksellers Association, et al., Fort Wayne Books, Inc. v. Indiana, 109 S.Ct. 916 (1988).

32. Operation Rescue is a New York-based coalition of anti-abortion protesters. Protests by the group, which had started in mid-July, had resulted in more than 1,000 arrests by the end of the month. New York Times, July 30, 1991 at 16A, col. 3.

33. 18 U.S.C. 1961-1968 (1988).

34. Although this section discusses civil RICO applications, criminal RICO prosecutions are possible against protesters who commit any of the statute's

enumerated predicate acts, with extortion the most likely crime that can be alleged.

35. See, e.g. People v. Smith, 161 Ill. App.3d 213,214 (1987) (two years court supervision and $100 fine).

36. 18 U.S.C. 1962(a).

37. 18 U.S.C. 1961(5).

38. U.S. v. Ivic, 700 F.2d 51 (2nd Cir. 1983); National Organization for Women v. Scheidler, et al., 1992 U.S. App. LEXIS 14865 (7th Cir. 1992); U.S. v. Anderson, 626 F.2d 1358 (8th Cir. 1980).

39. 700 F.2d 51 (2nd Cir. 1983).

40. 868 F.2d 1342 (3rd Cir. 1989).

41. Thomas v. Collins, 323 U.S. 516,537 (1945).

42. U.S. v. Grace, 461 U.S. 171, 176-77 (1983).

43. Texas v. Johnson, 491 U.S. 397, 405-06 (1989).

44. Thornhill v. Alabama, 310 U.S. 88,97 (1940).

45. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147,156 (1969) (it "would have taken extraordinary clairvoyance" for protesters to foresee such a narrow interpretation of a parade ordinance.)

46. McMillion, Rhonda. ABA Journal, October 1991, v.75:112.

47. A different legal strategy against anti-abortion activists, using a general civil rights statute, was recently successful in Wichita when U.S. District Judge Patrick Kelly restrained protesters. Women's Health Care Services v. Operation Rescue, No. 91-1303K (D.Kan., August 5, 1991). Judge Kelly relied on a post-Civil War statute

popularly known as the Ku Klux Klan Act of 1871. 42 U.S.C. 1985. The Act prohibits conspiracies "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. . . ." 42 U.S.C. 1985(3). The U.S. Supreme Court has ruled that the statute applies when there is "some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." Griffin v. Breckenridge, 403 U.S. 88,102 (1971).

48. *See*, Gale, The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement, 90 Colum. L. Rev. 1341, 1344 and accompanying notes 24-28 (1990).

49. *See generally*, General Services Administration, Federal Equipment Data Center, Automatic Data Processing Equipment in the U.S. Government (April 1990); General Services Administration, Office of Federal Information Resources Management, Micropcomputer Survey Report (September 1989); D. Brundy, Computers and Smaller Local Governments, 12 Public Productivity Review 184 (1988); Draemer, King, Dunkle & Lane, Trends in Municipal Informatio Systems, Baseline Data Report at 2 (Spring 1986).

50. *E.g.*, Fla. Stat. 1983, 815.01 et seq.; Minn. Stat. 1984, 609.87 et seq.; N.M. Stat. 1978, 30-16A-1 et seq.; Okla. Stat. 1981, Title 21, sect. 1 951 et seq.; S.C. Code of Laws 1976, sect. 16-16-10 et seq.; Tenn. Code Anno., 39-3-1401 et seq.; Utah Code Anno. 1953, 76-6-701 et seq.; Va. Code 1950 sect. 18.2-151.1 et seq.

51. Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521.

52. For example, under the Freedom of Information Act, failure to disclose information can lead to legal action requiring disclosure. Under the Privacy Act, disclosure of information covered by the Act can result in criminal action against the records custodian. The effect is to cause records custodians subject to both acts to err on the side of withholding records for fear of criminal sanctions. *See* Susman, The Privacy Act and the Freedom of Information Act: Conflict and Resolution, 21 J. Marshall L. Rev. 703 (1988).

53. *E.g.*, Fla. Stat. 895.02 (4).

54. Fla. Stat. 895.01 et seq.

55. Tyrer, Tampa Station to Pay in Computer Case, Electronic Media, May 29, 1989 at 3.

56. Fla. Stat. 815.02.

57. Tyrer, *supra* note 55, at 3.

58. *Id.*

Press Coverage of the Federal Appellate Courts: Technology and a Shared Notion of Newsworthiness

by

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Press Coverage of the Federal Appellate Courts: Technology and a Shared Notion of Newsworthiness

The mass media give virtually no coverage to federal appellate court decisions although those decisions, dealing with issues such as civil rights, the environment, taxes, abortion, pornography and crime, affect the daily lives of most U.S. citizens.[1] For approximately 99 percent of litigants in the federal court system, the 13 circuit courts of appeals are effectively the courts of last resort because only a handful of cases from the courts of appeals are reviewed by the Supreme Court of the United States.[2]

Better court coverage by the media is desirable to inform the public about legal issues that affect society and to perform a watchdog function over the judiciary. Frank M. Coffin, a federal appellate judge from the U.S. Court of Appeals for the 5th Circuit, has written:

> Citizens, individually and in groups, politicians, columnists, editorial writers, commentators, feature editors, investigative reporters, must know what they can realistically expect from their public servants . . . . Respect and censure, selectively meted out, based on appraisal of the performance of officials in the light of knowledge of the roles, powers, freedoms, restraints, and values governing them, are the lubricants of affirmative accountability. . . . To the extent that the public and the press know what should be deemed good or excellent in the work of their appellate judges, and what must be seen as shoddy, sloppy, or meretricious, such knowledge becomes a subtle

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[1] John Seigenthaler, "Welcoming Address," Proceedings of the American Society of Newspaper Editors 1989 (Washington, DC: American Society of Newspaper Editors, 1989)

[2] David Stolberg, "Pilot Program Aims to Help Newspapers Cover Federal Appeals Court, ASNE Bulletin, (July/August 1989), p. 31. The percentage of the decisions issued that are final was attributed to Judge Gilbert S. Merritt, chief judge for the 6th Circuit, from press material distributed by the circuit's information office and was in reference to the 6th Circuit specifically.

yet powerful force for improving the quality of judges and their work."[3]

During his term as president of the American Society of Newspaper Editors, John Seigenthaler,[4] then publisher of the *Nashville Tennessean* and editorial director for *USA Today*, teamed with Judge Gilbert S. Merritt, chief judge for the Sixth Circuit Court of Appeals, to address press coverage of the federal appellate courts, coverage that both men viewed as a shortcoming of U. S. newspapers.[5] In part because of their efforts, the circuit courts began the phased implementation of electronic bulletin board service systems. "To enhance public understanding of the work of the federal courts,"[6] the systems are designed to provide the public and the media with instant, online computer access to appellate court actions.

On January 1, 1989, the U.S. Court of Appeals for the 9th Circuit, based in San Francisco, Calif., began Appeals Court Electronic Service (ACES), the first online computer access system.[7] The service allowed "public users to view and transfer electronically published slip opinions, court oral argument calendars, court rules, notices and reports, and press releases."[8] However, on October 17, 1989,

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[3]Frank M. Coffin, The Ways of a Judge (Boston: Houghton Mifflin Co., 1980), p. 248- 249.

[4] Seigenthaler addressed this situation in many of his speeches and writings. Among them: the Meeman Lecture at the University of Tennessee, 1990; "Welcoming Address," Proceedings of the American Society of Newspaper Editors 1989 (Washington, DC: American Society of Newspaper Editors, 1989).

[5]Merritt, address at the Knoxville Bar Association and Society of Professional Journalists Seminar, April 1990.

[6]The quotation is attributed to Judge Gilbert S. Merritt, chief judge for the 6th Circuit, in press material distributed by the circuit's information office.

[7]Draft report, "Standard Citation to Electronic Opinions," Administrative Office of the United States Courts, Washington, D.C., July 18, 1991, p. 2.

[8]"Public Access to U.S. Federal Court Automated Information," information bulletin available from the Administrative Office of the United States Courts, Washington, D.C., March 12, 1990, p. 1.

an earthquake interrupted the availability of the computer system and the system was down until April 17, 1990.[9] The 6th Circuit's online access system, called CITE for Court Information Transmitted Electronically, was initiated on January 1, 1990, and has remained online since startup.[10] "Aimed at increasing public awareness and understanding of the legal system as a whole,"[11] the system provides users with "up-to-date information on the court's docket, the full text of newly filed slip opinions, the court's oral argument calendar, local rules of practice, descriptions and status reports of noteworthy cases, and other data."[12] On March 1, 1990, the U.S. Court of Appeals for the 4th Circuit also began an electronic information system that was essentially the same type as used in the 9th Circuit. With these electronic bulletin boards operating in the appellate court system, the media were given the means to provide more timely and through coverage of the appellate courts' actions. Prior to the initiation of these electronic court services that provide same-day information on appellate court actions, published opinions were often delayed for weeks.

The primary purpose of the research reported in this paper was to determine the quantity and quality of coverage that U.S. daily newspapers and the Associated Press have given to actions of the intermediate federal appellate courts and to determine the extent to which the availability of online computer access has changed

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[9]Telephone conversations with Cathy Catterson, Clerk, 9th Circuit, September 6, 1991, and September 16, 1991. Personal letter from Mark Mendenhall, assistant circuit executive for the 9th Circuit, August 30, 1991.

[10]The system is available seven days a week, 24 hours a day, except when the system's records are backed up or when the phone lines into the system are occupied.

[11]Information obtained from a press release by the public information office of the 6th Circuit announcing the initiation of the system in the circuit, January 1990.

[12]Ibid.

such coverage. In addition, the research attempts to explain the coverage from the viewpoints of journalists who report on appellate courts.

Theoretical perspectives guiding the research include: Peterson's theories of press responsibility;[13] Gaye Tuchman's view that news making is the social construction of reality;[14] the theory of agenda setting as first proposed by McCombs and Shaw;[15] and Bandura's social learning theory.[16] Also of importance to the study's development is Drechsel's conclusion that source relationships are important in determining news from the trial courts[17] and the finding of Whitney and Becker that wire editors have a significant influence in determining the news.[18]

Literature Review

Research and commentary about the media's scant coverage of the intermediate federal appellate courts is lacking and what is available is either descriptive or anecdotal. Almost all of the existing scholarly research about judicial coverage is directed at coverage of trial courts or the Supreme Court. However, any assessment of the media's coverage of the U.S. court system is instructive to the degree that the U.S. court systems are similar. That is, press performance in covering the Supreme Court may, in many instances, be like the media's coverage of

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[13]Fred S. Siebert, Theodore Peterson, and Wilbur Schramm, Four Theories of the Press (Urbana: University of Illinois Press, 1963), pp. 73-103.

[14]Tuchman, Making News, (New York: The Free Press, 1978), pp. 1-244.

[15]M.E. McCombs and D.L. Shaw, "The Agenda-Setting Function of Mass Media," Public Opinion Quarterly, 36 (1972), 176-187.

[16]A. Bandura, Social Learning Theory (Englewood Cliffs: Prentice-Hall,1977).

[17]Robert E. Drechsel, News Making in the Trial Courts (New York: Longman, Inc., 1983), pp. 96-144.

[18]D. Charles Whitney and Lee B. Becker, "'Keeping the Gates' for Gatekeepers: The Effects of Wire News," Journalism Quarterly, 59 (Spring 1982), pp. 60-65.

the circuit courts. When research indicates that even the highest court in the land with its yearly average of fewer than 150 decisions is receiving inadequate coverage, the implication is that the more than 22,000 cases terminated on the merits by the second tier appellate courts may be all but ignored.[19]

Previous research has characterized media coverage of the courts as inadequate, passive and part-time.[20] A *Los Angeles Times* survey of 100 members of the bar, bench, press and academe in 1980 indicated that while most of those interviewed thought the media's coverage of the U.S. courts was greatly improved, they also felt "media coverage of the nation's legal system is still largely inadequate . . . ."[21] Specific criticisms of the media's coverage of the U.S. courts

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[19] The Administrative Office of the United States Courts reported that the appeals courts terminated on the merits more than 22,700 cases during fiscal year 1991.

[20] Dorothy A. Bowles and Rebekah V. Bromley, "A Preliminary Profile of Supreme Court Coverage by News Magazines, 1981-1989," Proceedings of the University of Tennessee, Knoxville, College of Communications' 1991 Research Symposium, pp. 67-90; Dorothy A. Bowles and Rebekah V. Bromley, "News Magazine Coverage of the Supreme Court During the Reagan Administrations," Journalism Quarterly (in press); Michael Solimine, "Newsmagazine Coverage of the Supreme Court," Journalism Quarterly, 57 (Winter 1980), pp. 662; J. Douglas Tarpley, "American Newsmagazine Coverage of the Supreme Court, 1978-1981,"Journalism Quarterly, 61 (Winter 1984), pp. 801-804, 826.William O. Douglas, The Court Years, 1939-1975: The Autobiography of William O. Douglas (New York: Random House, 1980), pp. 205-206; Drechsel, News Making in the Trial Courts, pp. 1-7; David Ericson, "Newspaper Coverage of the Supreme Court: A Case Study," Journalism Quarterly, 54 (Autumn 1977), pp. 605-607; Max Freedman, "Worse Reported Institution," Nieman Reports, (April 1956), p. 2; Henry R. Glick, Courts, Politics, and Justice (New York: McGraw Hill, 1982), pp. 317-318; David L. Grey, The Supreme Court and the News Media (Evanston, Illinois: Northwestern University Press, 1968), pp. 43-82; William P. McLauchlan, American Legal Processes (New York: John Wiley & Sons, 1977), pp. 58, 195; Richard A. Posner, The Federal Courts (Cambridge: Harvard University Press, 1985), p. 3; John Seigenthaler, "Welcoming Address," Proceedings of the American Society of Newspaper Editors 1989 (Washington, DC: ASNE Publications, 1989), p. 10; David Shaw, "Press Coverage of Legal Issues Often Superficial, but Improving," Los Angeles Times, November 11, 1980, pp. 3, 17-19; Dorothy A. Bowles, "Newspaper Editorial Support for Freedom of Speech and Press, 1919-1969,"(unpublished Ph.D. dissertation, University of Wisconsin-Madison, 1978), pp. 1-4, 111; Stephen L. Wasby, The Impact of the United States Supreme Court: Some Perspectives (Homewood, Illinois: The Dorsey Press, 1970), pp. 83-99.

[21] Shaw, p. 3.

have included such things as neglecting larger issues, failing to provide follow up stories, ignoring the appellate courts and reporting inaccuracies and inconsistences.[22]

In a 1974 study of Supreme Court coverage of three newspapers, Ericson concludes newspaper readers would be largely uninformed of most of the Court's decisions. Later studies examining coverage of the Court by the three leading news magazines reach the same conclusion.[23] Solimine and Tarpley found that only about 15 percent of the Court's output was covered by the weekly news magazines. Bowles and Bromley find that during the 1980s the magazines provided for even less coverage of the Court's decisions, approximately 10 percent.[24] Ericson's study indicates that newspapers rely heavily on news-service summaries of Court decisions and that this factor may contribute to the quantity and quality of coverage.

Studies suggest that inadequate coverage may be a function of several media factors: journalists' determination of newsworthiness, professional practices, organizational constraints, lack of traditional news sources, geographical constraints and journalists' scant legal training.[25] As a result of these barriers, journalists

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[22]Shaw, pp. 3, 17-19.

[23]Bowles and Bromley, p. 72; Ericson, pp. 605-607; Michael Solimine, "Newsmagazine Coverage of the Supreme Court," Journalism Quarterly, 57 (Winter 1980), pp. 662; J. Douglas Tarpley, "American Newsmagazine Coverage of the Supreme Court, 1978-1981,"Journalism Quarterly, 61 (Winter 1984), pp. 801-804, 826.

[24]Bowles and Bromley, pp. 72.

[25]Lowell Brandner and Joan Sistrunk, "The Newspaper: Molder or Mirror of Community Values?" Journalism Quarterly, 43 (Autumn 1966), pp. 487-504; Drechsel, pp. 118-134; Glick, pp. 317-318; McLauchlan, pp. 58, 195; Richard J. Richardson and Kenneth N. Vines, The Politics of Federal Courts (Boston: Little Brown, 1970), p. 118; Gaye Tuchman, Making News (New York: The Free Press, 1978), pp. 15-103; Gaye Tuchman, "Making News by Doing Work: Routinizing the Unexpected," American Journal of Sociology, 79, 1 (1979), pp. 110-131; James G. Stovall, Writing for the Mass Media (2d ed.; Englewood Cliffs: Prentice-Hall, 1990), pp. 84-85; David M. White, "The 'Gatekeeper': A Case Study in the Selection of News," Journalism Quarterly, 27 (Fall 1950), p. 390; D. Charles Whitney and Lee B. Becker, "'Keeping the Gates' for Gatekeepers: The Effects of Wire News," Journalism Quarterly, 59 (Spring 1982), p. 65.

either ignore entirely the actions of a major branch of government or else inform the public about a narrow range of issues.

McLauchlan asserts that the failure to use a legal expert in the coverage of the courts most likely results in "a superficial story, covering over the subtleties and complexities of the decision. Furthermore, the newspaper coverage is likely to be devoted to highly visible and controversial cases that people are interested in reading."[26] Hale's survey of wire reporters and jurists finds jurists displeased with the media coverage given to state appellate courts. Drechsel's study of trial court coverage in Minnesota suggests a media predominantly oriented to covering criminal cases, an orientation that, perhaps, excludes coverage of other types of cases or issues.

The broad jurisdictional scope of the circuit courts and the finality of the courts decisions suggest that the actions and decisions of the federal appellate courts should be well covered by newspapers and the news services. However, the previously delineated criticisms of the media's coverage of the U.S. courts suggest otherwise. George Edwards, chief judge of the 6th Circuit in 1980, has said, "Press coverage of the really important issues is somewhere between lousy and abysmal."[27] Yet, the press alone may not be to blame for the inadequacies of coverage.

Many of the factors that may influence the media's news coverage of appellate court actions may well be a result of the circuit courts' structure and functions. Specifically, contributing court factors may include such things as the

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[26]McLauchlan, p. 195.

[27]Shaw, p. 3.

courts' location, workload, preferences for secrecy, case complexity at the appellate level, the nature of case decisions and the tradition of judicial restraint.

Regarding the secrecy in which appellate judges work, Judge Coffin noted:

> Appellate judges, excepting only the justices of the Supreme Court of the United States, are often no more visible or comprehensible to the citizen than the vapor-inhaling priestesses at the Oracle of Delphi. The judges sit in a phalanx behind their elevated bench, listen to argument, ask a few questions, and, weeks or months later, issue an opinion. Exactly what goes on, if anything, between argument and decision is veiled in mystery.[28]

Additionally, the Supreme Court of the United States and the intermediate federal appeals courts do not lend themselves to the organizational constraints of the mass media.[29] While the Supreme Court and the circuit courts differ in many significant ways, the complexity of gathering news about either is similar. The difficulty of the process is vividly captured in Grey's description of the Supreme Court: "The Court still speaks on complex issues -- often at great length and with multiple concurring and dissenting opinions -- and then remains silent; the press still is left with the task of trying to interpret such floods of legal words within minutes or only a few hours."[30] Further, by "tradition and necessity,"[31] the judiciary remains aloof and guarded, and its conflicts and resolutions reach the media and the public in a highly stylized written product constructed for other jurists.[32]

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[28]Coffin, p. 4.

[29]Thomas W. Church, Jr., "Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals," Restructuring Justice, ed. Arthur D. Hellman (Ithaca, New York: Cornell University Press, 1990), chap. 9, p. 240.

[30]Grey, p. 2.

[31]Ibid., p. 15.

[32]Glick, p. 311.

Within the appellate court system, journalists rarely have sources to provide an early warning of major decisions. Additionally, unlike other branches of the government, appellate court personnel do not conduct press conferences. Typically, the courts have no press liaisons to interpret the actions of the courts or to arrange for officials to be available for comment after a decision is announced.[33]

Early on, press observers suggested that the locations of the courts also act as a restraint on news coverage because the numbered circuit courts have jurisdiction for several states. For example, the 6th Circuit, which has jurisdiction in the states of Michigan, Ohio, Kentucky and Tennessee, is based in Cincinnati. While this location could enhance coverage of the court by media in proximity to Cincinnati, those published in other cities would have to expend greater resources to obtain similar coverage unless they choose to rely on a news service such as the Associated Press.

Purpose and Method

This study used both quantitative and qualitative methods to measure the impact of the online computer system and to gather information about the quantity and quality of press and AP coverage of the intermediate federal appellate courts. A content analysis was conducted of appellate court coverage by six newspapers and the AP six months before and six months after the introduction of the 6th Circuit's CITE system. The purpose was to determine whether and to what degree U.S. daily newspapers and AP covered actions of these courts and to what extent the availability of online computer access may have changed coverage. Additionally, the study sought to determine whether a relationship existed between newspapers'

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[33]Grey, pp. 43-44; Delmar Karlen, Appellate Courts in the United States and England (New York: New York University Press, 1963), p. 55.

coverage of the intermediate federal appellate courts and the geographic location and economic characteristics of newspapers. Under consideration was whether coverage by newspapers published within the cities where the courts were based differed from coverage by newspapers published in other cities.[34] Newspaper economic characteristics examined were circulation, ownership and competitive environment.

In addition to the content analysis, in-depth interviews were conducted with journalists who covered courts within the 6th Circuit to determine their views about the media's appellate court coverage. Specifically, the study sought to determine the ways in which the journalists covered the actions of the courts and to identify barriers that may impede coverage of the actions of the courts.

Research questions guiding this study were as follows:

(1) How much coverage did the newspapers and news service, collectively, give to the courts of appeals?

(2) Did the frequency of occurrence of news articles and briefs differ for newspapers when jurisdictional area, online access, circulation, size, location, ownership and competitive environment were considered?

(3) What was the subject of news stories concerning the circuit courts of appeals?

(4) In stories about cases decided on the merits, which legal issues received coverage? Were First Amendment issues and other media-oriented cases covered more frequently than other legal issues?

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[34]A U.S. Circuit Court of Appeals may sit or conduct the court's business in any city within the court's jurisdictional area. Typically, a court of appeals will sit where the court is based. However, even when a panel of the court does not sit where the court is based, the administrative actions and decisions of those panels are initially announced where the court is based.

(5) To what degree did news stories about the circuit courts of appeals involve an extraordinary "event," a nationally known personality or a national official?

(6) Were the news stories published in newspapers about the circuit courts of appeals written more frequently by the newspapers' staffs, AP, or other?

(7) Based on the presence of specified quality characteristics, how thorough was the coverage of cases decided by the courts?

(8) In the opinion of press and judicial representatives, how well did the press cover the actions of the circuit courts and what were the characteristics of the press coverage?

Evidence of newspaper coverage of the intermediate federal appellate courts was gathered through a content analysis of all news articles and briefs published from July 1, 1989, to June 30, 1990, in a purposeful, multi-stage sampling of circuits and variables under studyof newspapers available on VU/TEXT and DIALOGUE data bases.[35] Data on AP coverage were gathered during the same time period through a similar examination of news articles and briefs transmitted by the AP.

The six newspapers selected for inclusion in the study by appellate court jurisdiction were 6th Circuit, *Lexington* (Ky.) *Herald-Leader*, *Columbus* (Ohio) *Dispatch*; U.S. Court of Appeals for the 7th Circuit, *Chicago* (Ill.) *Tribune* , (Gary, Ind.) *Post-Tribune*; U.S. Court of Appeals for the 10th Circuit, (Denver, Colo.) *Rocky Mountain News*; *Wichita* (Kan.) *Eagle*.

Newspaper publishing characteristics related to circulation size, proximity to city where court was based, ownership, competitive environment, presence of the

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[35]Information obtained from the University of Tennessee, Knoxville's Database Search Service.

specific news value, story origin and news articles authorship were coded for each news story. The primary focus of each article was coded into one of seven categories: (1) decided case(s); (2) subsequent stories about decided case(s); (3) pending cases; (4) individual appellate court justices; (5) nominee or potential nominee; (6) appellate courts in general; (7) "other." Additionally, each story about decided case(s) was also coded by legal issue. The legal issue categories included criminal, civil rights, First Amendment and "other."

As measures of quality of coverage, each news article about a decided case(s) was coded for the inclusion of eight descriptive reporting variables: (1) case name or name of one or more parties identifying the specific case; (2) background facts or litigative history of the case(s); (3) the courts' vote; (4) mention of statutes, regulations, or precedents that applied in the case; (5) mention or discussion of majority's reasoning in the case; (6) mention of discussion of the probable or expected impact of the decision; (7) reaction to the courts' decision; (8) the source of the reaction, including parties in the case, legal experts not involved in the case, "average" person, persons not directly involved in the cases but who may be directly influenced by the outcome, other, or more than one of the above sources.

One person read and analyzed the articles, using a 41 item coding sheet. Depending on appropriateness, either a test of proportions or chi-square was used for comparisons of the data. The .05 significance level was established for statistical analyses.

To measure intercoder reliability, a second person recoded the subjective data on the coding forms on 19 percent of the articles. Variables that could be categorized objectively, such as date, name of publication and authorship, were not evaluated for intercoder reliability. Variables such as legal issue and article focus, as well as the quality characteristics, were checked by the second coder. The subjective

data on the coding forms was analyzed using Scott's Pi.[36] The results of this analysis was a .94 intercoder reliability coefficient.

Interviews for the study were conducted in February 1992 with 11 selected journalists working in the 6th Circuit jurisdictional area who had experience in covering the federal appellate courts. Additionally, the court press officer for the 6th Circuit was interviewed.[37] The sample was not selected randomly; rather an effort was made to locate journalists who worked at newspapers published in the 6th Circuit. Further, an attempt was made to talk with both editors and reporters who were employed by newspapers that varied in circulation size, proximity to the city where the court was based, ownership and competitive environment.

The telephone interviews provided for a qualitative assessment of press coverage of the intermediate appellate courts and the usefulness of the electronic bulletin board systems adopted by the courts.

Results

Number and Frequency of Stories

Combined, the six newspapers and AP published 541 stories about the circuit courts of appeals from July 1, 1989, through June 30, 1990, with 54 percent (292) of those news articles and briefs appearing in the newspapers and 46 percent (249)

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[36]Scott's $Pi = P_o - P_e / 1 - P_e$, where P_o is the observed percentage agreement and P_e is the percentage agreement expected by chance.

[37]The following persons were interviewed. In three instances, participants asked that their confidentiality be protected. (1) Ray Belew, copy editor and former appellate court reporter for the *Columbus* (Ohio) *Dispatch*; (2) Sandy Hodson, courts and county governments reporter for the *Jackson* (Tenn.) *Sun*; (3) Randy Edwards, court reporter for the *Columbus* (Ohio) *Dispatch*; (4) Ben L. Kaufman, former court reporter for the *Cincinnati* (Ohio) *Enquirer*; (5) Robin Lugar, newspaper researcher for the *Lexington* (Ky.) *Herald*; (6) Ron Moore, court reporter for the *Chattanooga* (Tenn.) *Free-Press*; (7) Debra Nagle, press information officer, 6th Circuit Court of Appeals; (8) John Nolan, Associated Press, Cincinnati; (9) Jim Ripley, an editor for the *Dayton* (Ohio) *Daily News*; (10-12) Three editors who worked for newspapers in the 6th Circuit who asked that their identities not be revealed.

of the stories published by AP. The news service, however, averaged approximately 92 more words per article and 185 more words per news brief than the newspapers. Of the 541 newspaper and AP stories, approximately 88 percent, or 476 news accounts were published articles, while 65 news accounts, or 12 percent, were written as news briefs.

To account for the probability of duplication of stories covered by the newspapers, an average number of stories for each newspaper was estimated. On average, each newspapers published 49 news stories about court actions. Of those 49 stories, each newspaper averaged 38 news articles and 11 news briefs. In comparison, AP wrote two news briefs during the time period about the appellate court and 247 news articles.

Impact of Online Access

Online computer access did not significantly impact coverage of the 6th Circuit's actions although online computer access resulted in a real increase in the number of total newspaper stories originating from the 6th Circuit (see Table 1). However, the increase was not greater than would be by chance. The news service showed a decrease in stories originating from the 6th Circuit after the availability of online access and no change in the amount of coverage of stories originating from other circuits.

When online access availability was cross tabulated with newspaper circulation size, location, ownership and competitive environment, real differences in the amount of coverage again were evident, but the differences were not statistically significant (see Table 1). With one exception, the average amount of total newspaper coverage of the intermediate appellate courts for all groupings was greater in the six months following the availability of computer access than in the six months prior to the availability of the 6th Circuit's system. For the three

newspapers with circulations of 250,000 or less, the average amount of total coverage was 13.3 stories in the six months before the availability of online access compared to 12.7 stories for the six months after the 6th Circuit's system came online.

On average, more coverage of appellate court actions appeared in the three newspapers with circulations of 250,001 or more, the five group-owned newspapers, the two newspapers published in cities where the court was based and the two newspapers with competition. In contrast, on average fewer articles about appellate courts appeared in the three newspapers with smaller circulations, the one independently owned newspaper, and the four newspapers published in cities other than where courts were based. It should be noted that the newspapers categorized as being located near the court were also the same two newspapers categorized as being published in a competititve environment. Similarly, the four newspapers categorized as being located away from the court were also the same newspapers categorized as being published in an environment without competition.

Authorship and News Value

Of the 541 stories written by the newspapers and AP less than 15 percent of the stories exhibited the news value of "nationally known personality, extraordinary event or national official." In cases decided on the merits, 8.4 percent of the stories in both AP and the newspapers contained this news value.

Overall, news stories published in newspapers were written more frequently by the staff of the AP news service than the newspapers' staffs, a combination of staff and AP authorship or authorship from other. A greater percent of stories were staff-generated in the jurisdictions without computer access than in the jurisdiction with online service, the difference was statistically significant. Approximately 40 percent of the stories in jurisdictions without online access capability were staff-

generated and approximately 30 percent were written by AP. In the jurisdiction with computer access, approximately 15 percent of the stories were staff-written and 73 percent were written by the news service. Although the findings were statistically significant, the results were unduly influenced by one newspaper, the *Chicago Tribune*, in which almost one-half of the newspaper's 124 stories were staff-written.

When individual newspapers were examined, only the *Chicago Tribune* and the Gary *Post-Tribune* published more stories about appellate court actions written by staff members than articles written by the AP. While the *Rocky Mountain News* and the *Wichita Eagle* published more articles written by AP than staff-written articles, the two newspapers had more articles either staff-written or a combination of AP and staff-written stories than AP written stories. Both the *Lexington Herald-Leader* and the *Columbus Dispatch* published more AP written stories than staff-written stories about the appellate courts.

Subjects Covered

As shown by the frequency comparisons of subjects for newspapers and AP in Table 2, the six newspapers combined published more stories about cases decided on the merits and fewer stories about court operations in general than for any of the other subject categories. The news service also wrote fewer stories about court operations in general, but published one more story about "other" court actions than about cases decided on the merits.

Of the combined 541 newspaper and AP stories, approximately 44 percent were about decided cases, 6 percent concerned pending court cases, 2 percent were about nominees to the court, 4 percent were about court justices, fewer than 1 percent were about court operations in general, 43 percent were about "other" subjects, and 1 percent of the stories were in the category in which the subject could not be determined. A large portion of the news articles and news briefs counted in

the "other" category were stories that originated from the federal district courts and the Supreme Court or were about stays of execution. Stories about individual motions and petitions were also included in this category. The stories in the "other" subjects category were included in the analysis as the result of the original computer search protocol that selected all stories in which the courts of appeals were mentioned.

When subject categories other than decided cases are examined for each newspaper, the *Columbus Dispatch* wrote a greater percentage of its stories (5 of 22, or 23 percent) about pending cases than did any of the other newspapers. While the *Chicago Tribune* published more stories about pending cases than any other paper, only six of its 124 stories (approximately 5 percent) dealt with pending cases. Three newspapers, the *Columbus Dispatch* , *Rocky Mountain News* , and the Gary *Post-Tribune*, published no stories about nominees, and neither the *Columbus Dispatch* or the Gary *Post-Tribune* published any stories about court justices or court operations in general.

Three newspapers published more stories about "other" subjects. The newspapers were the *Rocky Mountain News*, the *Lexington Herald-Leader* and the Gary *Post-Tribune*. More than half of the stories (58 percent or 25 or 43 stories) in the *Rocky Mountain News* were about "other" subjects. The category for two stories in the *Rocky Mountain News* and three stories in the *Chicago Tribune* could not be determined.

The AP published 109 stories (44 percent of its 249 stories) about subjects other than the ones specified and approximately 60 percent (149 of 249) of the news service stories, were in categories other than decided cases. For one AP story, the subject category could not be determined.

Decided Cases

As indicated by Table 3, newspaper and AP coverage, as a proportion of cases decided on the merits, was scant. Of the 21,006 cases decided on the merits by the numbered courts of appeals in one year, only one-half of 1 percent of the cases were covered by AP. The six newspapers, on average, covered approximately one-tenth of 1 percent of the cases during the same time period. The *Chicago Tribune* , which covered approximately three-tenths of 1 percent of the cases decided on the merits (60 news articles and briefs) published more stories about decided cases than any of the other newspapers, but still covered fewer of the decisions than the AP did. Approximately 45 percent of the 292 newspaper stories were about decided cases and approximately 43 percent of the 249 AP stories were about decided cases.

Even though the percentage of stories about cases decided on the merits was one-half percent or less for the media, four newspapers published 40 percent or more of their stories about decided cases. Sixty-eight percent of the appellate coverage of the *Columbus Dispatch* focused on decided cases. In comparison, the *Rocky Mountain News* published 28 percent (12 of 43) of its stories about decided cases, and approximately 29 percent of the *Lexington Herald-Leader's* coverage (10 of 34 stories) was about decided cases. The *Wichita Eagle* published 51 percent of its stories about decided cases, and the Gary *Post-Tribune* and the *Chicago Tribune* published 40 percent and 44 percent, respectively, of their stories about decided cases.

Nature of Decided Cases

Coverage of appellate cases that were terminated on the merits differed according to the nature of the case. As shown in Table 4, the largest number of stories, 117 for newspapers and AP combined, were about issues other than criminal, civil rights and the First Amendment. Most of the issues in the category

labelled "other" concerned anti-trust cases, procedural issues and cases concerning large damage claims.

Together, the newspapers and AP published 47 stories about criminal cases, 45 about First Amendment cases and 29 about civil rights cases during the time period. To account for the probability of duplication of cases covered by the newspapers, the average number of stories in each category for each paper was computed. When viewed in this manner, the newspapers' average number of stories about decided cases concerning criminal, civil rights and the First Amendment issues were less than that of AP. On average, each newspaper covered 4.5 criminal cases, 4.2 First Amendment cases and 2.5 civil rights cases. In comparison, the news service covered 20 criminal and 20 First Amendment cases and 14 civil rights cases.

Forty percent of the stories about decided cases in the *Lexington Herald-Leader* concerned the First Amendment. In contrast, the *Rocky Mountain News* published no stories about decided cases in which the First Amendment was at issue. The *Columbus Dispatch* and Gary *Post-Tribune* each published one story about First Amendment cases. Of the remaining two papers, the *Chicago Tribune* had one-quarter of its decided case stories about the First Amendment, and the *Wichita Eagle* published less than one in five of its decided case stories about the First Amendment.

Criminal issues rather than civil rights or First Amendment issues were given the most attention in the *Wichita Eagle* , *Rocky Mountain News*, and the Gary *Post-Tribune* . The *Columbus Dispatched* published more stories about civil rights, and the *Chicago Tribune* had more stories about First Amendment issues than either of the other two categories.

One-half of AP's stories about decided case stories concerned issues other than criminal, civil rights and the First Amendment. Criminal and First Amendment

issues each attracted 20 stories or 18.5 percent of the news service coverage of decided cases, and 14 stories, or 13 percent, were about civil rights issues.

Quality of Coverage

Analysis of the quality of coverage was based on the content of news articles about cases decided on the merits were chosen to be content analyzed. News briefs were eliminated because it was assumed such abbreviated stories would be less than comprehensive accounts.

Consequently, 105 newspaper articles and 107 AP articles were analyzed for quality characteristics. However, when comparisons were made between stories originating from the jurisdiction with online access and stories from jurisdictions without online access, seven additional newspaper and 22 additional AP articles were omitted. The eliminated stories were articles either from the 4th and 9th Circuits, jurisdictions that had online access capability for some portion of the study, or articles for which the circuit of origin could not be determined.

The published accounts of decided cases by newspapers and AP were scant. Of the published stories, AP members and subscribers would have been moderately informed and newspaper readers would have been rather poorly informed about some of the cases as shown in Table 5.

More than half of AP's stories about decided cases included six of the eight items identified in this study as measures of quality coverage, and 49 percent of the AP stories drew on multiple sources for reactions to the courts' decisions. In contrast, only four of the measures of quality coverage were identified in more than half of the newspapers stories, and only 21 percent of the stories drew on multiple sources for reactions to the courts' decisions.

The specific name of the case or enough identifying information for readers to locate the case and the background or litigative history of the case were present in

more than than 90 percent of the newspaper and AP articles. While less than one-half of the news articles by AP and the newspapers gave the specific vote of the courts, more than 70 percent of the articles gave the majority's reasoning. The dissenting reasoning, however, was given in only 10 percent of the newspaper articles and 17 percent of the news service stories.

Nearly three-quarters of AP's stories about cases gave reactions to the court's decision with more than one-half of the stories providing either the reaction from the winning or losing parties in the case. In contrast, 40 percent of the newspaper stories about cases gave reactions to the court's decision with fewer than one-third of the stories providing a reaction from either the winning or losing parties. Overall, slightly more than one-fifth of the newspaper stories contained reactions from more than one source. Neither the AP nor the newspaper stories contained reactions from the "average" person and fewer than nine percent of the stories contained reactions from experts, persons not involved in the case who might be effected by the outcome or persons categorized as "other."

Journalists' Views

All of the reporters interviewed for this study expressed the viewpoint that press coverage of the federal appellate courts could be improved. As barriers to adequate press coverage of the appellate courts, most of the journalists cited their newspaper's lack of proximity to the city where the court was based and a general lack of reader interest . Other reasons cited included: the reluctance of the judges to be sources, the content of the court cases, competing demands for a reporter's time, the paper's format and mission, the lack of editor interest in stories about legal technicalities or editors' perceptions that stories about legal issues were dull. The journalists indicated that, while helpful, the online access availability had not had a significant impact on the barrier created by a lack of proximity.

"Mostly, it is a lack of proximity," said Randy Edwards, a court reporter for the *Columbus* (Ohio) *Dispatch*. "The only person I have talked to at any length is Debra Nagle, but I have never met her. I need to get down there and meet some of those people."

"It was difficult for me not to be in Cincinnati to cover specific cases," said Ray Belew, former appellate court reporter for the *Columbus* (Ohio) *Dispatch* and now night copy editor for the newspaper. "Trips would have taken all day to go to Cincinnati to hear oral arguments."

While viewed as helpful in news gathering, the online computer system by the 6th Circuit was not seen by all the journalists as totally solving the distance problem. The quantitative evidence presented in this study supports this perception, as the increase in coverage after the implementation of online service was not statistically significant.

Ron Moore,*Chattanooga* (Tenn.) *Free-Press* reporter, said that he did not get as much out of the system as he might. Moore implied that the deadlines of an afternoon paper were not compatible with the loading of docket information on the CITE system and that the newspaper's computer wasn't handy or exclusively for his use. He did say, however, "Before it was three or four days before we would get a decision. Now, you can find it logged in on the system."

Several journalists expressed a reluctance to rely totally on the online system. "You try to pay attention to the public record as best you can to find out what is on the [court] calendar," Edwards said. However, in Edward's experience, personal sources were usually "much more helpful than trying to rely on the record."

Sandy Hodson at the *Jackson* (Tenn.) *Sun* said she had difficulty accessing the online system of the 6th Circuit, so she relied on tips from the 6th Circuit's press officer for information about appellate cases involving an individual or a company in

the newspaper's coverage area. Others, including AP's John Nolan, Moore, and Ben Kaufman of the *Cincinnati Enquirer*, also relied on Nagle's prompt.

Debra Nagle, information officer for the 6th Circuit, viewed CITE as successful, but saw CITE's role as being different from what was originally conceived. Nagle said it had been unrealistic to think that the media could absorb all of the information the 6th Circuit or any court could produce. Initially, Nagle said, "we expected newspapers to 'discover' the 6th Circuit and create a 6th Circuit beat. It is not realistic to expect newspapers to support an exclusive federal court beat."

As a public information tool -- as a method of getting information easier and quicker -- then CITE has been successful, in Nagle's opinion. "It would be impossible to fax opinions to everyone," Nagle said. "The more you can get online, the easier it is going to be to get the 'word' out to reporters. But, you have to get the word out to reporters yourself because they just don't have the time to find the word themselves."

The literature review and the data analysis had indicated that the newspaper size, as measured by circulation, competition and ownership, could also make a difference in coverage of the appellate courts. Commentators on court coverage indicated that other factors influencing coverage might be a newspaper's philosophy, readership, resources, personnel, the nature of the courts' actions, the traditions of the judiciary and the journalists' news defining and news gathering practices. The journalists confirmed these perceptions in whole or in part.

Except for Kaufman of the *Cincinnati Enquirer*, journalists interviewed indicated that newspapers were more likely to cover appellate court actions involving cases that originated locally or within the 6th Circuit than from other geographical or jurisdictional areas. Most of the journalists viewed "local interest" as the primary news selection criterion for coverage of the appellate court actions. Ben Kaufman of the *Cincinnati Enquirer* was the exception.

"When I was on the beat," said Kaufman, "I focused heavily on decisions that addressed the First, Third, Fourth and Fifth Amendments. You keep in people's minds that there are limits to what the authorities can do and that there are limits to freedom."

Kaufman said, "I enjoy the intellectual activity of the courts, rather than the win and lose. I would suggest to reporters that cover the courts that they should get it clear with their editors whether they are interested in the win and lose or the intellectual activity, trends and directions of the courts."

Nagle was of the opinion that media in the circuit had done a very good job of covering the 6th Circuit over the past couple of years.

"They are very diligent about following up on coverage of trials in their respective areas," Nagle said. It was her opinion that the media was "very interested in following a case to its ultimate conclusion."

"In a perfect world," Nagle said, "I want [the reporters] to cover every case the court decides. There are more cases than are getting covered, that as a [former] journalist I would find imminently newsworthy." However, complete coverage was not likely to happen, in Nagle's view, because "there is just too much competition out there. There are too many people with too much news, and there is not enough column inches and not enough time on the air."

The analysis of stories' authorship of stories indicated that the newspapers were heavily reliant on the news service for coverage of the courts and that the news service covered more of the cases that were decided on the merits than did the newspapers on average. These findings were supported by the observations of the journalists, including AP's Nolan.

Nolan said the Associate Press considered the same news values that newspapers considered in deciding to cover an appellate case. The AP, he said, looked to see "whether the decision would effect a number of people or be of interest

to a number of people. One person that had appealed for federal benefits and was denied would effect only one person, and we usually don't bother with it unless it is really an unusual case that would make an interesting read." In general, Nolan said, AP had a list of cases that it followed, but they relied on "Nagle to keep us posted on the major ones."

According to Nolan, AP coverage also depended on the amount of other major spot news, such as a large plane crash, and time. "If I had the opportunity, I would like to sit in on more arguments where the lawyers present them to the judges, but we have to pick and choose," he said.

"Sometimes," Nolan said, "speed can be a hindrance. That is a problem on the wire service in general. You have to write a lot of things fast. We can't allow that much time on any story because we have to do a lot of things at once."

The limited coverage of the appellate courts' actions may result also from the failure of newspaper management to designate a specific reporter to cover the beat. Many newspapers contacted during this study had no reporter who had covered the appellate courts or who had used the online computer system. The coverage method described by an editor of a large Tennessee daily newspaper was typical of the responses received.

"We don't have a person assigned to cover the beat," he said. "We watch the wire. If a big story moves, we will assign a reporter familiar with the subject to cover the story."

As further explanation for the limited amount of coverage, the background information on the courts suggested that the reticent of the judges to discuss cases could influence the amount of coverage given to court actions. These findings were supported by the journalists interviewed.

"I would like to see them [judges] be a little more open," said Hodson of the *Jackson Sun*. "I think the more the judges would talk, the more the people would

understand the legal system in this country, how it works." The judges will not, however, talk to Hodson about any cases, she said, even though she always calls "just to get the no."

Most of the journalists interviewed for this study were of the opinion that the quality of the existing coverage of appellate court actions could change if editors and reporters would give increased attention to appellate court stories. This increased attention was unlikely, however, in the view of many of the journalists.

Editor Jim Ripley of the *Dayton (Ohio) Daily News* said:

> Let's realize what we do here. We don't write for a specialized audience. We don't write for the lawyers in town. We write for a mass audience. Our job is to understand it [the decision] in layman's terms, so we get the experts to talk to us, then we write about it. Our job is not to write about legal nuances. It is to make the newspaper interesting. We are not a paper of record. Few papers are anymore. I don't think our readers give a hoot. I think they want to know what is going on, but in a way that makes it worth their white to read it . . . . If it [decision] has a tangible impact on our readers, then we are interested.

Conclusions and Discussion

The results of this study indicate that, overall, newspaper and news service coverage of the intermediate federal appellate courts altered, but not significantly, after the availability of online computer access in the 6th Circuit. Similarly, while differences were found in coverage, when coverage was isolated for stories originating in the 6th Circuit and newspapers' circulation, location, ownership and competitive environment, the differences were not greater than those that could have occurred by chance.

The lack of significant change in coverage may be interpreted in several ways. First, data analyses and anecdotal information suggest that news coverage of the actions of the courts of appeals is so slight that increased coverage will not be realized unless changes are made by news gathering organizations and the judicial

system. That is, the availability of online computer access in the courts of appeals and the use of these services by reporters alone can not overcome the numerous barriers to court coverage or increase significantly the overall coverage. Other measures may be needed to overcome the passive traditions of the bench and the inattention or lack of priority news organizations give to the appellate courts.

Second, the advantages of online computer access in one circuit is marginal, relative to the need of news organizations to cover court actions in all appellate circuits. Therefore, greater differences might appear if the newspaper sample were increased significantly.

Third, an analysis of only six months of newspaper and news service coverage after the availability of computer access may not provide enough time for the technology to have been adopted or for the impact of the technology to be measured. A future study, providing for a greater time span for this technological innovation to be diffused, might reveal greater before and after differences in coverage.

The findings in this study indicate that newspapers tend to rely on AP for coverage of appellate courts. Yet, AP covers only one-half of one percent of appellate cases decided on the merits. As indicated by both the Whitney and Becker gatekekeeping study and this study, local media are influenced greatly by the decisions of a relatively few editors operating at the regional and national bureaus of the wire services. However, from this study it is not clear whether the shared news values of the news service and the newspaper editiors or the volume of AP coverage was the key factor. Regardless, the consequences of this dependence on AP, as it relates to coverage of the appellate courts, are profound. As *Cincinnati Enquirer* reporter Kaufman noted when interviewed for this study, the public requires information on the state of its rights and the quality of the performance of the

members of the judiciary who make the decisions that determine the limits and freedoms of those rights.

The study also suggests that the press may be failing to meet a primary public service obligation by neglecting most actions of the appellate courts. Peterson has suggested that the privileges enjoyed by the press carry responsibilities such as acting as a watchdog against government improprieties and providing the public with sufficient information so that the public is capable of self-government. As indicated by this study, the media, in failing to meet those primary responsibilities outlined by Peterson, leave a media-dependent public ill-informed and ill-equipped to access the actions of a major branch of government.

Certainly, this study has suggested that the information flow from the appellate courts is overwhelming, and news organizations must prioritize the news and make personnel and resource decisions based on those priorities. As evidenced by the limited amount of coverage and the reliance on AP, it would appear, however, that a re-evaluation of priorities and a reallocation of personnel is in order.

Tuchman has proposed that news making is a process of compromise developed by news personnel to manage an overwhelming flow of information. As Tuchman points out, however, this interpretive process may lead to gaps in information as a result of a professionally shared notion of news. When considered in light of this study's evidence of scant coverage of the appellate court actions and the journalists' observations that the amount of coverage could be improved, it appears that the shared notion of newsworthiness may well result from institutionalized news gathering practices that do not accurately capture the importance of the decisions of these federal courts. At a minimum, the news organizations' perception that readers are interested in softer news topics and the trend to compress hard news topics into less space requires another look by news professionals.

For example, it is not enough to say we don't cover the courts because "we don't write for lawyers" or "the appellate case didn't involve anyone from our hometown" or "distance makes it difficult." Because appellate court decisions, regardless of circuit, impact the basic freedoms of all citizens, the decisions demand a higher news priority. The decisions, most likely final, demand more coverage than this study indicates they are receiving. As first articulate by McCombs and Shaw in their 1972 Chapel Hill study of undecided voters in the 1968 presidential campaign, the media may not tell the public what to think, but the media may well tell the public what to think about.

Lastly, this study, as evidenced by the review of literature and the anecdotal evidence provided by the participants in this study, indicates that the judiciary might improve press coverage about its activities if judges were more forthcoming. Drechsel found in his study of a state court system that although almost half of a reporter's information comes from court documentation, the reporter needs informed sources for help in determining newsworthy events and in identifying and clarifying important issues. This need for judicial expertise may result from a reporter's time constraints, aggravated by other reporting responsibilities, organizational deadlines and the lack of legal expertise. Today, however, only one press information officer is employed at the intermediate appellate level. Perhaps, additional press officers would help improve news coverage.

TABLE 1

NUMBER OF NEWSPAPER STORIES: DEMOGRAPHIC CHARACTERISTICS BY ONLINE ACCESS AVAILABILITY

NEWSPAPER DEMOGRAPHICSM	BEFORE ONLINE ACCESS (n = 90)	AFTER ONLINE ACCESS (n = 102)
Origin of Story	90	102
(6th Circuit)[a]	(16)	(17)
(Other Circuits)[b]	(74)	(85)
Circulation		
250,001 or Above[c]	50	64
250,000 or Below[d]	40	38
Ownership		
Group Owned[e]	82	90
Independently Owned[f]	8	12
Location/Competition		
Near Court/With Competition[g]	42	52
Away From Court/No Competition[h]	48	50

N = 192

[a] Test of proportions, z = .2, p of .42.

[b] Excludes stories originating from the 4th and 9th Circuits because these two circuits had online access capability that was not isolated. Test of proportions, z = -.2, p of .42.

[c] Test of proportions, z = -1.01, p of .16.

[d] Test of proportions, z = 1.01, p of .16.

[e] Test of proportions, z = .65, p of .26.

[f] Test of proportions, z = -.65, p of .26.

[g] Test of proportions, z = -.60, p. of .27.

[h] Test of proportions, z = -.60, p. of .27.

TABLE 2

QUANTITY OF COVERAGE BY SUBJECT OF STORIES IN NEWSPAPERS AND AP

SUBJECT OF STORIES	NP (n = 292)	AP (n = 249)
Cases Decided on the Merits	130 (44.5%)[a]	108 (43.4%)[b]
Pending Cases	19 (6.5%)[a]	11 (4.4%)[b]
Nominees	5 (1.7%)[a]	4 (1.6%)[b]
Judges	10 (3.4%)[a]	13 (5.2%)[b]
General Court Stories	2 (0.7%)[a]	3 (1.2%)[b]
Other	121 (41.4%)[a]	109 (43.8%)[b]
Undetermined	5 (1.7%)[a]	1 (0.4%)[b]

N = 541
[a] Subject percent based on n = 292.
[b] Subject percent based on n = 249.

TABLE 3

QUANTITY OF COVERAGE ABOUT DECIDED CASES

QUANTITY OF COVERAGE	NP (avg./np)	AP
Number of Stories About Cases Decided on the Merits	21.7	108
Percent of Cases Decided on the Merits Covered	.103%[a]	.514%[a]

[a] N = 21,006 for Decided Cases on the Merits, Fiscal Year 1990.

TABLE 4

QUANTITY OF COVERAGE ABOUT DECIDED CASES BY LEGAL ISSUE IN NEWSPAPERS AND AP

LEGAL ISSUE COVERED	NP (n = 130)	AP (n = 108)	NP & AP (N = 238)
Criminal	27[a]	20	47
	(20.7%)[e]	(18.5%)[f]	(19.7%)[g]
Civil Rights	15[b]	14	29
	(11.5%)[e]	(13.0%)[f]	(12.2%)[g]
First Amendment	25[c]	20	45
	(19.2%)[b]	(18.5%)[c]	(18.9%)[d]
Other	63[d]	54	117
	(48.5%)[e]	(50.0%)[f]	(49.2%)[g]

Note: It may be assumed that the number of legal issues covered by newspapers reflects duplication because the newspapers frequently reported on the same cases.

[a] avg/np 4.5.
[b] avg/np 4.2.
[c] avg/np 2.5.
[d] avg/np 10.5.
[e] Percent based on n = 130.
[f] Percent based on n = 108.
[g] Percent based on n = 238.

TABLE 5

QUALITY CHARACTERISTICS OF STORIES IN NEWSPAPERS AND THE NEWS SERVICE

STORY CHARACTERISTICS	NEWSPAPERS (n = 105)	NEWS SERVICE (n= 107)
Case Name	105 (100%)	107 (100%)
Background Facts	99 (94.3%)	107 (100%)
Statute Mentioned	67 (63.8%)	82 (76.6%)
Vote Reference	29 (27.6%)	50 (46.7%)
Majority Opinion	74 (70.5%)	82 (76.6%)
Dissent Reasoning	10 (10.3%)[a]	12 (16.9%)[a]
Impact of Case	51 (48.6%)	59 (55.1%)
Reaction to Case	43 (41.0%)	79 (74.0%)
Winner's Reaction	29 (27.6%)	57 (53.3%)
Loser's Reaction	31 (29.5%)	55 (51.4%)
Expert's Reaction	4 (3.8%)	7 (6.5%)
Average Person	0 (0.0%)	0 (0.0%
Interested Person	5 (4.8%)	9 (8.4%)
Other	1 (1.0%)	4 (3.7%)
More than One Source	22 (21.0%)	52 (48.6%)

[a] Eight newspaper articles and 36 news service articles decisions were unanimous, precluding discussion of dissent. Percent for the newspaper cell is based on an N of 97 and percent for the news service cell is based on an N of 71.

The Evolution of Illinois

Defamation Law over 102 Years

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Two areas in the law of defamation have not received much attention. The first of these is a comparative analysis of the law before and after 1964 when a constitutional dimension was first introduced into defamation law in New York Times Co. v Sullivan.[1] Especially in a period when current defamation law is being seriously questioned and far-reaching reforms are proposed,[2] it would seem useful to inquire into the actual consequences of First Amendment protection for defamation defendants. One might expect a dramatic increase in the number of successful defendants, but it is an untested hypothesis.

Second, only passing reference has been made to the cases involving nonmedia defamation defendants in the literature.[3] Understandably, the major U.S. Supreme Court cases predominately involve media defendants and the media can be expected to focus attention on those cases in which they are involved. While the Court has expressly refused to differentiate between media and nonmedia defendants, have they in fact been treated the same for constitutional purposes? Combine this inquiry with the quest for data preceding 1964 and intriguing questions emerge regarding the success rate of different defendants at different times.

This paper involves a survey of all Illinois defamation cases from 1888 to 1989, some 312 cases. This paper does not pretend to answer completely the questions posed above because Illinois cases, of course, represent only a fraction of the total and the survey revealed some aspects likely unique to that state. But it does attempt to put those questions in debate because the answers presented in this paper to those and other questions should bear directly on the future course of defamation law.

I. Pre- and Post-Sullivan

Only 61 Illinois defamation cases occurred before 1964, and 246 (not counting 1964 cases), or four times as many, occurred in the 25 years following. This could be read to suggest that defamation is not exempt from the oft-noted litigation explosion of the past three decades. But it could also be taken as evidence of the proposition that the 1964 decision in Sullivan actually disserved defendants' interests.

Libel lawyer Arthur B. Hanson once observed that, after Sullivan, a previously obscure tort received prominent attention in every constitutional law course in the country.[4] The case might have had the opposite effect intended, he said, in that although it supposedly offered more protection to defendants, it also might have generated many more cases by giving the tort this higher profile. Even winning defendants lose in the American system because of the uncompensated costs of presenting a defense.

The costs were mitigated somewhat because very few of the cases actually proceeded to a jury verdict. The overwhelming number were resolved with a motion to dismiss or, to a much lesser extent, a motion for summary judgment. The same preponderance of successful pretrial motions was evident before Sullivan as well as after, though.

Of the entire sample of 312 cases, defendants won at trial 257 times or 82 percent of the time. Before 1964, defendants won 41 of the 61 cases, or 67 percent. After 1964, they won 86 percent of the cases. It would seem, at first glance, that the Sullivan decision has had a pronounced effect.

Three things should be noted, though. First, even a 67 percent success rate at trial would be the envy of defendants in almost any other area of civil law. Second, because this survey only covers reported appellate opinions, it is possible that the results are skewed if,

for example, defamation plaintiffs are less likely to appeal adverse judgments than are defendants. Professor Marc A. Franklin raised this possibility when he conducted a study of reported cases between 1976 and 1979, but he concluded that defamation plaintiffs are more likely to seek appellate review than other classes of plaintiffs.[5]

A third consideration regarding the spectacular success rate for defendants after Sullivan is that qualified privilege and the innocent construction defense, which is peculiar to Illinois and relevant primarily after 1962, played a decisive role in fully two-thirds of those defendants' victories. The full impact of qualified privilege and innocent construction will be reviewed presently, but they clearly complicate an assessment of Sullivan's impact.

Of the 49 cases won outright by plaintiffs[6] at trial, 18 or a little more than one-third have been overturned on appeal. Fifteen of the 18 have occurred since 1964. But of the 257 cases that defendants won outright at trial, 47 or almost one-fifth were overturned on appeal, and 40 of those have been since 1964!

The final tally then, after more than 100 years of defamation cases, comes to an ultimate 73 percent success rate for defendants. The ultimate success rate for defendants after Sullivan is 76 percent compared to 61 percent before.

Appellate review lowered the success rate of defendants both before and after 1964, and reduced the disparity by four percentage points. A jump of 15 percentage points in the success rate after 1964 is still significant, but the bromide that appellate courts are more sensitive than trial courts to First Amendment interests was not borne out in Illinois.

One discrete example of the adverse appellate environment involves prosecutions for criminal libel. The state of Illinois has brought six criminal libel cases over the 100-year

period, the most recent in 1984.[7] Two of the cases from the first half of this century were really seditious libel cases, involving libels of the state's attorney[8] and a county treasurer.[9]

In another case from the same period, one defendant received six months imprisonment for claiming those who went to war were the refuse of the nation, bums and felons, and the American Legion lied when it said its members were the noblest of the American people.[10]

One of the six criminal libel cases, Beauharnais v. Illinois,[11] was appealed all the way to the U.S. Supreme Court, and the other five to the Illinois Supreme Court. In every case, at every step of the appellate process, the state prevailed -- including in the one case the defendant won at trial.

II. The Nonmedia Majority

Once identity of the defamation defendants as media or nonmedia is factored in, some surprising results emerge. The majority, 184 or 59 percent, involved nonmedia defendants. This is roughly consistent with Franklin's survey showing 70 percent of cases in the late 1970s involved nonmedia defendants,[12] but still it is a fact easy to forget or overlook when the greatest interest seems to be in media cases. The percentage actually increases slightly after 1964, with 62 percent of the cases involving nonmedia defendants.

It is most revealing, however, to consider that the explosion in defamation cases after 1964 has been largely at the expense of nonmedia defendants. Media cases jumped threefold after 1964, but nonmedia cases increased more than fivefold.

Especially given that the period after 1964 constitutes only about one-fourth of the total time period sampled, it becomes clear that nonmedia constitute a rapidly growing

proportion of defamation defendants. This may be the most significant finding of this study, because it illustrates the considerable stake that nonmedia have in the current debate regarding defamation reform.

It underscores that proposals put forward with media defendants in mind likely would have profound consequences for a much larger class of defendants. Moreover, this "silent majority" of defamation defendants is relatively disadvantaged by retraction statutes that serve only a privileged elite class of defendants. Illinois has no such statute, but 28 states do.[13]

Before 1964, nonmedia defendants won 21 of the 29 trials, or 72 percent. Media defendants, by contrast, won 17 of 27,[14] or only 63 percent. After 1964, though, media jumped ahead to a stunning 90 percent success rate at trial, while nonmedia defendants managed an 84 percent success rate. (See Table 1 next page)

TABLE 1
Comparison before and after Sullivan

	Before '64	After '64
Total cases	61	246
Number won by defendant at trial	41 (67%)	211 (86%)
Number of cases with media defendants*	27	92
Number of cases won by media at trial	17 (63%)	83 (90%)
Number of cases with nonmedia defendants	29	153
Number of cases won by nonmedia at trial	21 (72%)	128 (84%)

*In five cases, all before 1964, the status the defendant was indeterminate.

Once appellate results are factored in, though, nonmedia defendants achieved an ultimate success rate of 76 percent overall, 62 percent before 1964 and 79 percent after. Media defendants had an ultimate success rate of 69 percent, 59 percent before Sullivan and 71 percent after.

The appellate courts appear more receptive to nonmedia defendants, reversing twice as many of their losses and preserving a few more of their victories relative to media defendants. Eleven of the 12 nonmedia reversals of adverse trial court judgments came after 1964. (See Table 2 next page)

TABLE 2
Reversal rates for media and nonmedia

		Media defendants	Nonmedia defendants
Total cases (1888-1989)	312	122	184
Number won by defendant at trial	257	103 (84%)	150 (81%)
Of 49 cases defendant lost outright at trial, number reversed on appeal		6	12
Of 15 cases defendant lost outright at trial, but reversed on appeal after Sullivan		4	11
Of 257 cases defendant won outright at trial, number reversed on appeal		25	22
Of 40 cases defendant won outright at trial, but reversed on appeal after Sullivan		22	18

Both media and nonmedia defendants fared miserably before juries, however. Of the 43 jury verdicts, 19 involved media, of which they won only four. But of the 22 jury decisions involving nonmedia, they won only two.[15]

III. Common Law Predominates

Nonmedia defendants had their greatest success with the qualified privilege defense. Of 116 total cases in which this defense was raised, 85 involved nonmedia and 76 of those were considered privileged. Media defendants were successful in 19 of 27 cases in which they asserted the privilege.[16]

The bulk of this success has come after 1964. Nonmedia won using qualified privilege only six times before 1964 and media only once. The number of cases in which qualified privilege is asserted and in which it prevails far outpaces the proportionate increase in cases after 1964.

The innocent construction defense, with an 80 percent success rate overall for defendants, trails the qualified privilege defense only slightly. This defense, introduced two years before Sullivan in 1962, requires that "words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law."[17] Put another way, defendants must be given the benefit of any doubt regarding whether there has been a defamation.

It is a delight from an academic standpoint because of its virtual uniqueness to Illinois[18] and quirky outcomes, but it is anathema to plaintiffs. For example, courts considered themselves bound to construe innocently allegations of "rip-off speculators,"[19] "political hack,"[20] "sexual advances,"[21] faulty verification by an art expert of supposed masterpieces,[22] and "lousy" insurance agent.[23]

The case in which the doctrine surely was stretched to its limit involved an allegation that the mayor would "fix" traffic tickets. To the appellate court, this apparently conjured

an image of the mayor with scissors and tape, repairing all those tears to which traffic tickets are subject.[24]

The innocent construction rule was explicitly considered in 102 cases, controlling the outcome in 82. Indeed, it was unsuccessful in only one case throughout the 1970s.

Of the 102 cases, 52 involved nonmedia defendants. In 45 of those 52 cases, the nonmedia defendants prevailed based on innocent constructions. In 37 of the 50 cases involving media defendants, the defense was decisive. Thus, a greater percentage of nonmedia defendants benefitted (87 percent) compared to media defendants (74 percent).

Apparently attempting to curb some of the excesses, the Illinois Supreme Court in 1982 ruled in Chapski v. Copley Press[25] that the alternative interpretations of the alleged libels must be reasonable before they may fall within the innocent construction rule.[26] Including Chapski, 13 of the total 20 cases in which the defense was unsuccessful have occurred since 1982.

But the 1980s represent the decade with the most innocent construction cases, so a 69 percent success rate for all defendants claiming innocent constructions after 1982 demonstrates the continued vitality of the defense.

The opinion privilege figured in 22 cases, with 16 of the cases occurring during the period 1985-1989. It was successful in 16 of the 22 cases, or 73 percent of the time. But in the five-year period beginning with 1985, it had been successful only 58 percent of the time.

Given the availability of other successful defenses in Illinois, the opinion privilege never figured very prominently in Illinois law. Any inroads into the privilege represented

by the U.S. Supreme Court's decision last Term in Milkovich v. Lorain Journal[27] will not be felt in Illinois the way they might in other jurisdictions where the privilege was more commonly asserted.

The truth defense was successful in 15 of 26 cases in which it was asserted. In eight cases during the 1960s and 1970s, it was successful on all but one occasion, but it was only successful one of five times during the 1940s and 1950s.

Media defendants resorted to the truth defense in the majority of the cases, 16 of the 26, and were successful in exactly half. Nonmedia were successful in 7 of 10 cases in which they attempted to prove truth. Overall, though, the defense was asserted in only eight percent of all cases and proved decisive in less than five percent of the total.[28]

Other defenses proved even less noteworthy. The fair report defense only figured in 15 cases, the statute of limitations in ten, and neutral reportage in six (with the last four rejecting it). The consent defense was raised in none.

Likewise, the elements of defamation did not seem to be much at issue in Illinois. Lack of sufficient identification was proven in only 2 of the 14 cases it was asserted, lack of publication in three of six, and absence of reputational injury in none.

With the dominance of common law defenses in Illinois, it is perhaps understandable that constitutional privileges actually were relevant in only about 23 percent of the 246 cases after 1964. It might well be said that innocent construction is Illinois' version of the actual malice privilege.

Even when relevant, though, the actual malice privilege ultimately protected the defamation in 34 of 53 appeals and the negligence privilege in two of four. The 64 percent

success rate with actual malice is substantially below defendants' overall success rate of 76 percent after appeal.

Notably, the rate of success with actual malice would have been much higher if lower court judgments had not been disturbed. In 15 cases, the trial court found actual malice to protect defendants, but the appellate courts reversed. In only three cases did appellate courts reverse trial court judgments adverse to defendants on constitutional grounds.

IV. Conclusion

Illinois has experienced a fourfold increase in the number of reported defamation opinions in the 25 years from 1965 to 1989, compared to the number of reported cases in the 76 years preceding 1964. That likely is explained largely by a burgeoning population and avid litigiousness generally during the last three decades. Still, the number of cases per year averaged about three-and-one-half in the five-year period preceding Sullivan, and eight per year for the five years following. There is no doubt that Sullivan influenced defamation law, but some of the consequences might have been unanticipated and unwelcome.

Even if the high profile Sullivan gave defamation law did prompt some increase in suits, though, the remedy at this point would not seem to be overturning Sullivan. That would only illuminate how many suits Sullivan might have actually discouraged.

Defamation defendants, over a period of 102 years, won an incredible 82 percent of the time at the trial court level, 67 percent before Sullivan and 86 percent after. I may have been too quick earlier in positing an adverse appellate environment for defamation defendants in Illinois. After all, about one-third of plaintiffs' victories at trial were set aside on appeal, while only about one-fifth of defendants' victories were overturned. One

might argue that if only the trial courts had found in favor of plaintiffs more often, then Illinois appellate courts would have been able to reverse more of them and possibly demonstrate more sensitivity to First Amendment interests. As it was, since almost nine of every ten cases were appeals of defendants' victories, they were vulnerable by their sheer numbers.

Still, the bottom line is that the appellate process substantially reduced defendants' rate of success at trial. After the final appeal in each case is factored in, defendants' rate of success shrank from 82 percent to 73 percent. Defendants' rate of success at trial before Sullivan was reduced from 67 percent to 61 percent after appeal; the rate after Sullivan dropped from 86 percent to 76 percent after appeal.

About six out of ten cases involve nonmedia defendants. In a development deserving scrutiny and further analysis, their numbers are growing rapidly. While the number of cases after 1964 increased by a multiple of four, the number of nonmedia defendants increased by a multiple of five. True, many more media are being sued for defamation given the tremendous increase in cases, but they are not provoking as many suits as nonmedia and their proportion of the total number of suits is actually shrinking.

This may be a consequence of the greater costs and stiffer resistance generally associated with suing media entities. Defamation plaintiff's attorneys generally work on contingent fee,[29] and nonmedia may seem to offer better opportunities for settlement. Still, the deep pockets associated with most media would seem an inviting target. Tangentially, 41, or 13 percent, of the cases included attorneys as plaintiffs, the largest single class of plaintiffs.

Breaking out the media and nonmedia defendants demonstrates that nonmedia triumphed at trial more often than media (72 to 63 percent) before Sullivan, but media take the trophy with a slight edge over nonmedia after Sullivan (90 to 84 percent). Nonmedia have the last laugh, however, with an overall success rate of 76 percent after appeals compared to 69 percent for media. The nonmedia rate of success after appeals amounted to 62 percent before Sullivan and 79 percent after; media success after appeals jumped from 59 percent before Sullivan to 71 percent after, lagging the nonmedia rate of success after appeals at every step.

While fewer cases feature media than nonmedia defendants, the former suffer disproportionately in the appeals process, actually losing more cases than nonmedia. Of cases won by defendants at trial, media lose not only a greater percentage on appeal, but more cases in absolute numbers than nonmedia on appeal. Similarly, media have fewer of their own losses at trial overturned on appeal than nonmedia.

One speculates at one's peril about why media fare worse than nonmedia on appeal. But a few facts may be relevant. First, if appellate courts seem relatively inhospitable, juries are even worse, and nonmedia seem to suffer disproportionately at their hands. However, only 43 of the 312 cases proceeded to jury verdict. The vast majority were decided in the defendants' favor at trial based on motions for dismissal or summary judgment.

Given that the trial court judge is the key player, it may also be relevant that Illinois judges are elected, and an Illinois statute requires defamation trials to be held in the county of the defendant publisher's residence or principal office.[30] If the media defendant is going to have clout with anybody, it would seem to be with the trial court judge rather than an

appellate panel.

But such generalizations and even this empirical research tend to ignore that every case is unique, and the reasons for the media losses likely are as numerous as the cases. It was cold comfort to the Alton Telegraph that the trial was held in its home county when the trial court judge presiding in an ongoing libel case against the paper sought the paper's endorsement in an upcoming election, and the paper declined to give it. The judge's last act before leaving office (after losing the election) was to deny all the Telegraph's post-trial motions and uphold the $9.2 million verdict.[31]

While the statistics regarding defendant victories certainly show significant improvement after Sullivan, that more likely is due to the advent of the innocent construction rule than constitutional privilege. Indeed, the common law is king in Illinois, and constitutional privilege gets what is left after innocent construction and qualified privilege decide the overwhelming majority of the cases.

The states in this federalist system often are referred to as 50 labs for experimentation to assist the federal government in choosing the best approach. Illinois seems to be taking this theory to heart, spurning for the most part the federal law that may well control defamation law elsewhere.

The home-grown innocent construction rule may seem to yield some unpredictable and even unjustifiable results, but really no more so than the actual malice privilege. The core principle of each is the same: to give the defendant the benefit of the doubt and liberate speech. Innocent construction, however, does not require proof of state of mind and has no ambiguous public concern or public figure prerequisites as actual malice does.

Although this study has uncovered a number of facts regarding the impact of constitutional law and the success of two classes of defendants, the question remains as to whether Illinois is maverick or microcosm. Has constitutional law displaced common law elsewhere? Are the rates of success before and after Sullivan much different in other states? How do nonmedia fare, and are they being dragged into court in ever greater numbers elsewhere as well? Is de novo review on appeal effective in protecting First Amendment interests?

When others have tried to address these questions, they have argued on the basis of policy, philosophy and precedent, but they really have been arguing in a vacuum. Without a clear understanding of the law and its implications before Sullivan, one can never tell for sure whether anything has changed, or even whether the change has been for the better.

In Illinois, things have indeed changed after 1964, but not as much as or for the reasons one might have assumed before combing through more than 100 years of cases.

* Associate Professor. The author would like to thank graduate assistant Jodi Henkel for her tireless dedication to coding the cases in this study and the University of Illinois Research Board for funding assistance.

1. 376 U.S. 254 (1964). Professor Margaret Blanchard performed a singular service in revealing the role of the states in developing a framework for freedom of speech and press before the federal government began applying the First Amendment. Portions of her analysis are devoted to early libel cases. See Blanchard, Filling in the Void: Speech and Press in State Courts prior to Gitlow, in The First Amendment Reconsidered 14, 20, 22-23, 31-34 (B. Chamberlin & C. Brown eds., 1982).

2. See R. Bezanson, G. Cranberg & J. Soloski, Libel Law and the Press: Myth and Reality (1987); Proposal for the Reform of Libel Law: The Report of the Libel Reform Project of the Annenberg Washington Program, Washington: The Annenberg Washington Program in Communications Policy Studies of Northwestern University (1988); H.B. 590 (Ill. Gen. Ass., March 11, 1987) (An Act to provide for an alternative to defamation actions for damages).

3. See, e.g., Libel Defense Research Center, LDRC 50-State Survey 1982, at 157, 163 (1982); Franklin, Suing Media for Libel: A Litigation Study, 1981 Amer. B. Foundation Res. J. 795. But see Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 Amer. B. Foundation Res. J. 455. One notable exception is Drechsel, Defining "Public Concern" in Defamation Cases Since Dun & Bradstreet v. Greenmoss Builders, manuscript to be published in Federal Communications Journal, copy on file with author. Among other insights, Drechsel observed that nonmedia defendants suffer arbitrary results.

> "Only if their expression directly and unambiguously pertains to government, political issues or other major public debate is it likely to be found to involve a matter of 'public concern.' Even then a 'public concern' finding is less than certain because the courts appear to question the motives of nonmedia defendants more closely than those of media defendants."

Id. at 18.

4. Speech at annual convention of Association for Education in Journalism and Mass Communication, July 26, 1982.

5. Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 Amer. B. Foundation Res. J. 455, 462-63:

> [I]nsurance industry sources have told us of their sense that suits for defamation are not idly brought and tend to be pursued with more vigor than other types of claims....
>
> The danger that the focus on reported decisions will skew our study of defamation cases, both media and nonmedia, is thus much smaller than it would be in physical injury tort cases, in which unreported settlements at all levels are the rule and unreported decisions are common because they involve no new law.

6. Five of the 49 "plaintiffs'" victories at trial were brought by the state in criminal libel prosecutions.

7. The Illinois Supreme Court upheld the state's criminal libel statute. People v. Heinrich, 104 Ill.2d 137 (1984).

8. People v. Doss, 384 Ill. 400, 51 N.E.2d 517 (1943) (unstated punishment).

9. People v. Fuller, 238 Ill. 116, 87 N.E. 336 (1909) ($200 fine plus court costs).

10. People v. Spielman, 318 Ill. 482, 149 N.E. 373 (1925).

11. 343 U.S. 250 (1952).

12. Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 Amer. B. Foundation Res. J. 455, 465, 497.

13. Louise W. Hermanson, "Retraction: Analysis and Comments," at 10 (paper presented to the Law Division of the Association for Education in Journalism and Mass Communication annual convention, August 1990) (copy on file with author).

14. In five of the 61 cases before 1964, the media/nonmedia status of the defendant was indeterminate.

15. In two of the 43 jury verdicts, the status of the defendant was indeterminate.

16. In four of the 116 cases, the defendant's status was indeterminate.

17. John v. Tribune Co., 24 Ill.2d 437, 442-43, 181 N.E.2d 105, 108 (1962).

18. There is some authority suggesting its applicability in Missouri and Montana, and libels capable of innocent constructions apparently require proof of special damages in Oklahoma, North Carolina, Alabama and, possibly, Missouri. R. Sack, Libel, Slander and Related Problems 68 & n.121 (1980).

19. Bruck v. Cincotta, 56 Ill. App. 3d 260, 264-65, 371 N.E.2d 874, 878-79 (1977).

20. Cooper v. Rockford Newspapers, Inc., 50 Ill. App.3d 247, 249, 365 N.E.2d 744, 745-46 (1977).

21. Roemer v. Zurich Ins. Co., 25 Ill. App.3d 606, 323 N.E.2d 582 (1975).

22. Porcella v. Time, Inc., 300 F.2d 162, 167 (7th Cir. 1962).

23. Valentine v. North American Co., 16 Ill. App.3d 277, 305 N.E.2d 746 (1973), aff'd, 60 Ill.2d 168, 328 N.E.2d 265 (1974).

24. See Watson v. Southwest Messenger Press, 12 Ill. App.3d 968, 973, 299 N.E.2d 409, 413 (1973): "[T]he word 'fix' ... could mean the process of repairing, mending or putting in order...."

25. 92 Ill.2d 344, 442 N.E.2d 1 (1982).

26. Professor Michael Polelle considered the rule unjustifiable in terms of logic, precedent and policy. Polelle, The Guilt of the "Innocent Construction Rule" in Illinois Defamation Law, 1981 N. Ill. U.L. Rev. 181, 212. He favored overturning it, but noted that its "absurdity" would be

> perhaps alleviated, but not eliminated, by the suggestion that if words are given an innocent interpretation only when reasonably susceptible of it, then this part of the rule can be reconciled with the corollary requirement that the words be given their natural and obvious meaning.

Id. at 221. He wrote in the year before the Chapski decision and might well have affected the outcome.

27. __ U.S. __, 17 Med. L. Rptr. 2009 (1990).

28. This is consistent with Franklin's nationwide study of cases in the late 1970s, in which he found that "truth was rarely a crucial defense." Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 Amer. B. Foundation Res. J. 455, 494. He found that of nonmedia defense victories, truth controlled in five percent, and in media successes it was decisive in six percent. Id. at n.85.

29. See R. Bezanson, G. Cranberg & J. Soloski, Libel Law and the Press: Myth and Reality (1987)

30. Ill. Rev. Stat. ch. 110, sec. 2-103(d) (1985).

31. T. Littlewood, Coals of Fire 8-9, 161 (1988).

PRESS SHORTCOMINGS IN COMMENTARY ON THE 2 LIVE CREW OBSCENITY RULING

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Top Graduate Student Paper
Presented to the
"Significant Silences, Invisible Faces" Session
Sponsored by the
Commission on the Status of Women
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On June 6, 1990, a Florida federal judge made history when he declared obscene the 2 Live Crew rap album "As Nasty As They Wanna Be," the first such ruling ever governing a sound recording.[1] Two days later, police arrested the black proprietor of a record store near Fort Lauderdale when he sold a copy of the tape to an undercover agent.[2] On June 10, two of four band members were arrested on obscenity charges after they performed at a Hollywood, Fla., nightclub.[3] Media swarmed on the story. In the commentary generated by the obscenity ruling during the following months, the issue of free speech collided with concerns about the lyrics' celebration of sexual violence. Because the band members were black, racial considerations further complicated the tension between free speech and misogyny.

PURPOSE, METHODS AND LIMITS

The purpose of this paper is to examine how commentators in magazines and several major newspapers weighed the free speech concerns against concerns about misogyny when writing about "Nasty" in opinion and analysis pieces. From a historian's point of view, the subject is important because the way the media framed the "Nasty" issue helps illuminate American values as we enter the 1990s. For instance, commentators virtually unanimously

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[1] Skyywalker Records Inc. v. Navarro, 739 F.Supp. 578 (1990).
[2] LeMoyne, James, "Recording Ruled Obscene Brings Arrest," The New York Times (June 9, 1990), p. 8.
[3] Parker, Laura, "Rap Singers Charged With Obscenity," Washington Post (June 11, 1990), p. A1. The band members subsequently were acquitted, largely because the tape of the performance was unintelligible to jurors. "Rap Band Members Found Not Guilty In Obscenity Trial," The New York Times (Oct. 21, 1990), p. 26.

condemned the ban as a blow against free speech. For many, the discussion ended there. Some of these commentators also focused on racism, charging the prosecutions were racist attacks on a black band and black culture. For a few writers, the main issue was the sexually violent lyrics' misogyny. They worried public acceptance of such lyrics made sexual violence more acceptable. Which aspects of the 2 Live Crew controversy the print media chose to emphasize or ignore offers insights into the press's priorities, biases and limitations.

Because of the mass media's extensive influence, this paper contends the commentators' nonchalance helped legitimize a dehumanizing sexual creed. The paper will attempt to demonstrate how journalists minimized, rationalized or ignored the lyrics' misogyny. For instance, print commentary was virtually entirely authored by men. To rationalize their constitutional arguments against banning "Nasty," writers often made light of lyrics such as "I want to bust your pussy," failed to seek female sources for comment and exaggerated to a ludicrous extent "Nasty's" artistic value. While the purpose of this paper is not to argue "Nasty" should have been censored, the paper does attempt to answer the question of why influential, intelligent commentators declined to censure "Nasty" in light of its misogynistic message. The print commentators' cavalier attitude to "Nasty's" content is an example of why the absolutist approach to the first amendment in recent years has been challenged as racist and sexist.[4]

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[4]See *e.g.*, Bell, Derrick, And We Are Not Saved (1987); Matsuda, Mari, "Public Response to Racist Speech: Considering the Victim's Story," 87 U. Michigan L. Rev. 2320

The paper first traces the background of rap music. Next it discusses how publications dealt with "Nasty's" obscene lyrics, and then it analyzes the way in which magazines and individual commentators treated the free speech and sexual aspects of the controversy. The paper concludes that while some writers reached beyond the free speech issue to discuss the broader cultural significance of the sexual violence celebrated by the Crew, virtually all agreed it was secondary to the paramount importance of the first amendment. A fair number excused the misogyny on the grounds it reflects black culture, a liberal argument which backfired among insulted African Americans. One observation resulting from the analysis is that the lack of female voices in the print media, especially black female voices, as editors, writers or sources, is one reason print commentary gave such short thrift to the sexual issues raised by the "Nasty" debate. The paper ends with suggestions not only on how the press could have improved its coverage of "Nasty" but with suggestions for covering related debates in the future.

The paper uses traditional historical research methods to analyze commentary on 2 Live Crew, consisting of an analysis of nearly 50 magazine and newspaper opinion pieces on the 2 Live Crew controversy published between June of 1990 and January of 1991. [5] They include articles in Billboard, The Christian Century,

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(1989); MacKinnon, Catharine, "Pornography, Civil Rights, and Speech," 20 Harv. C.R.-C.L.L. Rev. 1 (1985), and Note, "Anti-Pornography Laws and First Amendment Values," 98 Harv. L. Rev. 460 (1984).

[5]Publications include all those listed in the Reader's Guide to Periodic Literature, the Access Supplementary Guide to Periodical Literature, the Magazine Article Index and the computerized periodicals index.

Commentary, Glamour, Harper's, The Humanist, Jet, Madamoiselle, Mother Jones, The Nation, National Review, The New Republic, Newsweek, People Weekly, Playboy, Rolling Stone, Time, U.S. News and World Report, Variety and Village Voice. Newspaper editorials, columns and analysis pieces were examined from several large newspapers chosen for their considerable national influence. They include The New York Times, Washington Post, Los Angeles Times, Wall Street Journal and Christian Science Monitor.

A search of the academic literature revealed several articles on the 2 Live Crew controversy focusing on the legal questions surrounding the obscenity ruling. One author said the decision in Skyywalker set a dangerous precedent for restricting artistic expression.[6] Another questioned the appropriateness of the community standards test in determining whether the album was obscene. [7]Several law review articles have appeared on constitutional questions regarding potential regulation of offensive rock albums[8] and on feminist criticism of contemporary first amendment jurisprudence concerning pornography.[9] Articles also

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[6], Gordon, Karyn G., Case note, Skyywalker Records Inc. v. Navarro, 22 Rutgers L.J. 505 (1991).

[7]Friedland, Steven I., "Race, rap and the community standards test of obscenity: the community of culture," 15 Nova L. Rev. 119 (1991).

[8]See generally, Holt, John W. "Protecting America's Youth: Can Rock Music Lyrics Be Constitutionally Regulated?" 16 Journal of Contemporary Law 53 (1990); Goodchild, Seth, "Twisted Sister, Washington Wives and the First Amendment: The Movement to Clamp Down on Rock Music," 3 Entertainment & Sports Law 131 (1986), and Roldan, Jonathan Michael, "Radio-active Fallout: the Aftermath of the Porn Rock Wars," 7 Loyola Entertainment L. J. 217 (1987).

[9]See, *e.g.*, MacKinnon, Catharine, Toward a Feminist Theory of the State (1990); Dworkin, Andrea, "Pornography is a civil rights issue for women," 21 U. Mich. L.Rev. 55 (1987); Hoffman, "Feminism, Pornography and the Law,"133 U. Penn. L. Rev. 497 (1985); Sunstein, Cass, "Pornograpy and the First Amendment," 4 Duke L.J. 589 (1986); Vega, Judith, "Coercion and consent: classic liberal concepts in texts on sexual violence," 16 Intl. J. of the Soc. of the L. 75 (1988).

have appeared in social research journals about how the screening of erotic films makes men more aggressive[10] and how extended viewing of pornography desensitizes viewers.[11] "The possibility of habituation to sex and violence may have significant social consequences," Shearon Lowery and Melvin DeFleur have written.[12] The literature demonstrated a scholarly interest in the relationship between free speech and sexual violence against women to which this paper hopes to contribute by analyzing media coverage of the "Nasty" controversy.

The paper is limited to an analysis of opinions expressed on the "Nasty" ban. No attempt was made to analyze straightforward news accounts of the issue. Neither was any television or radio coverage analyzed. Some newspaper accounts provided background on the obscenity ruling, and several magazine articles provided general background on rap music, censorship and pornography.

BACKGROUND

Rap is a recent musical phenomenon considered by some observers to be as potent a social force among young blacks as rock'n'roll was among the 1960s' rebellious youth.[13] Rap is "the first important cultural development in America in 25 years that the baby-boom

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[10]Tannenbaum, P.H., and Zillman, D., "Emotional Arousal in the Facilitation of Aggression Through Communication," in L. Berkowitz, ed., Advances in Experimental Social Psychology (Vol. 8) (New York: Academic Press, 1975).

[11]Ibid.

[12]Lowery, Shearon and DeFleur, Melvin, Milestones in Mass Communication Research (White Plains, N.Y.: Longman), 1988, p. 380.

[13]Whitaker, Charles, "The Real Story Behind the Rap Revolution," Ebony XLV (June 1990), p.35.

generation didn't pioneer," according to Newsweek.[14] Rap groups have been moving into the mainstream ever since the raw lyrics about ghetto life in "The Message' by Grandmaster Flash & the Furious Five attracted national attention in 1982.[15] RUN-D.M.C. sold more than three million copies of "Raising Hell" in the late 1980s.[16] Public Enemy won the 1988 Village Voice critics poll.[17] "The lyrics, a raucous stew of street-corner bravado and racial boosterism, are often slated with profanity, and sometimes with demeaning remarks about whites, women and gays," according to Time.[18] Contrast Time's disapproving tone with the words of a black writer in Essence, a middle-class black magazine: "[H]iphop speaks most directly to African-American pride and sense of self, failures of the American mess, our history, the things we lack and, ultimately, hope."[19] Most rappers are men and many rap lyrics are "glaringly sexist," according to one of the few black women who has written on the subject.[20] "[R]ap music is still very much a man's world," Essence wrote.[21] Women often are treated as sex objects, and the lyrics can be violent. 2 Live Crew "occupy a space in that segment of the rap world where macho preening and sexual braggadocio prevail," Ebony magazine said.[22]

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[14]Adler, Jerry, The Rap Attitude," Newsweek 115 (March 19, 1990) p. 56.
[15]Allen, Harry, "Hip Hop Madness," Essence 19 (April 1989), p. 79.
[16]Ibid, p. 80.
[17]Teachout, Terry, "Rap and Racism," Commentary 89 (March 1990), p. 60.
[18]Simpson, Janice C., "Yo! Rap Gets On the Map!" Time 135 (Feb. 5, 1990) p. 60.
[19]Allen, Essence, p. 119.
[20]Wallace, Michele, "When Black Feminism Faces the Music, and the Music Is Rap," The New York Times, (July 29, 1990), p. H20.
[21]Cooper, Carol, "Girls Ain't Nothin' But Trouble?" Essence 19 (April, 1989), p. 80.
[22]Whitaker, "The Real Story," Ebony, p. 36.

2 Live Crew's first single, "Throw the D," sold more than 200,000 copies after the group formed in Miami in 1985.[23] "The 2 Live Crew Is What We Are" album sold a half million copies, followed by "Move Somethin'," which doubled that sales figure.[24] Next came "As Nasty As They Wanna Be." "The Crew had found a sure-fire gimmick - combining the thudding Miami bass sound with extremely rude lyrics that bragged about outrageous sexual conquests," Rolling Stone said.[25] According to one account, the "Nasty" double album in 80 minutes refers 163 times to women as bitches or whores.[26] One lyric goes like this: "I'll break ya down and dick ya long/Bust your pussy then break your backbone" while a woman moans "no."[27]

The Florida district court judge ruled the album met the three criteria established by the Supreme Court in 1973 to determine whether material is obscene and thus unprotected by the Constitution. Obscene material is that which is found to be patently offensive to community standards; found by an average person to appeal primarily to prurient interest, and lacks serious artistic,

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[23]Ressner, Jeffrey, "On the Road with Rap's Outlaw Posse," Rolling Stone 584 (Aug. 9, 1990), p. 20. The "D" stands for the part of the male anatomy thrown during the dance.

[24]Applebome, Peter, "Tape Obscenity Is Upset," The New York Times (Feb. 23, 1990), p. C19. An Alabama store clerk who sold a copy of "Move Somethin', " which contained sexually explicit songs such as "S&M" and "Head, Booty and Cock," was convicted of obscenity charges in 1988. The conviction later was overturned by an Alabama Circuit Court. Ibid.

[25]Ressner, Rolling Stone, p. 20.

[26]"Rock, Roll and Raunch," People Weekly 33 (July 2, 1990), p. 88. The album also contains 226 uses of the word "fuck," 87 descriptions of oral sex and at least one mention of incest, according to Bob DeMoss of the conservative group Focus on the Family, whose tabulations first drew the attention of Florida authorities who banned "Nasty." Ibid.

[27]Lyrics from "Put Her in the Buck," on the album "Nasty As They Wanna Be," by 2 Live Crew, (Miami: Luke Records), 1989.

political or scientific value.[28] Record stores across the country stopped stocking "Nasty" as other cities enacted bans in the months following the June ruling,[29] and calls for a record labelling system accelerated.[30] By October, different juries acquitted the band members [31] but convicted the record store owner.[32] These events spawned an acrimonious, nationwide debate, a significant part of which centered on how the press reported the lyrics.

THOSE 'NASTY' LYRICS

One obvious shortcoming of the "Nasty" coverage was publications' failure to tell readers what the lyrics said. A computer search of 108 American newspapers turned up only 11 mentions nationwide of "the startling lyric that recommends tearing or damaging girls' vaginas," according to U.S. News & World Report.[33]

Conservative publications were more willing to publish the lyrics than liberal publications, which more loudly protested the obscenity. Readers of The Christian Century, for instance, were told exactly what "Nasty" said: "A big stinking pussy can't do it all/So we try real hard just to bust the walls ... Suck my dick, bitch/And make

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[28]Miller v. California, 413 U.S. 15, 24 (1973).

[29]"Prosecutors Step Up Nasty Pressure, More Retailers Pull Title in Response," Billboard 102 (June 30, 1990), p. 1.

[30]The recording industry agreed to voluntarily label recordings containing sexually graphic material in May of 1991.

[31]"Rap band members found not guilty in obscenity trial," The New York Times (Oct. 21, 1990), p. 26.

[32]"Obscenity conviction follows 'Nasty' sale," Durham Morning Herald (Oct. 4, 1990), p. 5.

[33]Leo, John, "Ugly truths untold by the press," U.S. News & World Report 109 (Sept. 10, 1990), p. 23.

it puke."[34] In contrast, The New York Times' readers learned only that, according to reporter Peter Watrous' interpretation, the group "...revels in the sort of creative obscenity heard in locker rooms, telling stories about sexual encounters with women and giving descriptions."[35] Ironically, the best source for learning what 2 Live Crew said was the Parents Music Resource Group, the conservative rock watchdog group. PMRC mails lyric sheets free upon request.

An exception to liberal reticence about the lyrics was The Nation, which printed some "Nasty" lyrics with unabashed glee. Christopher Hitchens described the theme of a song about a "busted pussy" as "the pains and joys of adolescence." "Dick Almighty," which contains the phrase "He'll tear the pussy open," was to Hitchens "a boastful and mock-heroic claim." Hitchens discerned the same "self-satirizing tone" in the nursery rhyme, " 'Jack got mad, kicked Jill in the ass/'Cause she couldn't make him cum.'" "I'm sorry but I think that's very funny," Hitchens wrote.[36] The Village Voice also quoted verbatim some of Campbell's dirty nursery rhymes in a news story which ended with an address where "First Amendment supporters" could write to buy the album.[37]

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[34]Dyson, Michael Eric, "2 Live Crew's Rap: Sex, Race and Class," The Christian Century 108 (Jan. 2-9, 1991), p.7.

[35]Watrous, Peter, "Graphic Stories of Sex Led to Case on Album," The New York Times (June 9, 1990), p. 8.

[36]Hitchens, Christopher, "Minority Report," The Nation 251 (July 30-Aug. 6, 1990), p. 120. Hitchens' comments spurred an article in Mother Jones about the "storm of repudiation from women's-rights advocates" created by his writings on 2 Live Crew and on abortion. Perrin, Dennis, "Hitchens Rehabilitated?" Mother Jones 1 (May/June 1991), p. 12.

[37]Simmons, Doug, "How to Rap Dirty and Influence People," Village Voice 35 (June 19, 1990), p. 95 .

The rock music magazine Rolling Stone, usually unadverse to printing four-letter words, refrained from even paraphrasing 'Nasty.' Writer Jeffrey Ressner asked Crew leader Luther Campbell to elaborate on the lyrics: "Campbell explains [bitch] is actually a term of endearment. 'We're talking about a hell of a woman who ain't gonna take shit - one of those *Dynasty* Alexis-type motherfuckers,' he says."[38] "It's the same stuff we do at home but aren't allowed to say in public," Campbell told Rolling Stone earlier.[39] Newsweek obscured "Nasty's" violence in its rating of rap's Top 10 by describing it as "The Kamasutra in gutter language."[40] In The New York Times, reporter Watrous relied on Newsday music critic John Leland, who testified as an expert witness on behalf of 2 Live Crew, to elaborate further on the song, "Get the Fuck Out of My House."[41] The song begins:

(Sampled voice of Eddie Murphy:"It's my house, and if you don't like it, get the fuck out.)

Get the fuck out, get the fuck out, get the fuck out of my house, bitch

Get the fuck out bitch!

Get the fuck out bitch!

If you in my house now ... you talkin' all that shit?

So get the fuck out, you sorry ass bitch

You come in my house, eatin' all my shit

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[38]Ressner, Rolling Stone, p. 20 and 24.

[39]Benarde, Scott, "Much More Than Nasty," Rolling Stone 573 (March 8, 1990), p. 62.

[40]Adler, Jerry, "The Rap Attitude," Newsweek 115 (March 19, 1990), p. 56.

[41]The Times wrote, "Get the ... Out of My House." Ibid.

So get the fuck out, you sorry ass bitch

Bitch ... bitch ... bitch ... bitch ... bitch (repeats over 28 times)...[42]

The Times wrote, "An outsider would take the song to be a misogynistic piece, fitting into a general misogynistic tone in the album.

"But Mr. Leland said: 'The tune is about house music,' a style of black music developed in Detroit and characterized by a prominent bass and clean technological sound."[43] Although the album is "certainly nasty," Times rock critic Jon Pareles contended it is not obscene because it has artistic merit as a dance album or scientific value as a "case study of exaggerated adolescent machismo."[44] Earlier, Pareles offered his most graphic description of "Nasty:" "...a good part of its lyrics are graphic, largely unprintable here, and often misogynistic, treating all women (known interchangeably as 'bitch') as more or less willing orifices."[45] He downplayed the lyrics' menace: "It's not just that they rhyme; they indulge in hyperbole that both the band and a good part of its audience recognize as wildly exaggerated and sometimes grossly funny."[46]

Three days later, Pareles provided more analysis of the "Nasty" lyrics. "Put simply, rap is an affirmation of self. ...And often, it defines that self as a sexually insatiable guy with a touch of the

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[42]Lyrics from an audio cassette tape of "Nasty As They Wanna Be," 2 Live Crew.
[43]Watrous, New York Times, p. 8. (The Times neither quoted nor paraphrased the song.)
[44]Pareles, Jon, "A New Role for Rock - Fighting Censorship," The New York Times (July 8, 1990), H24.
[45]Pareles, Jon, "A Rap Group's Lyrics Venture Close to the Edge of Obscenity," The New York Times (June 14, 1990), p. C15.
[46]Ibid.

outlaw. ... But not all rap machismo should be taken entirely at face value. ... Like other black literary and oral traditions, rap lyrics also involve double-entendre, allegory and parody."[47]

The Times' white-gloved approach to "Nasty" incited a barrage of criticism from other publications. "The (Times's) rock critics are regularly laughable in their nervous translations of the primal and obscene into the polysyllabic prettifications of their trade," said The New Republic. "2 Live Crew maintains that 'I can't be pussywhipped by a dicksucker,' and Jon Pareles explains that 'rappers live by their wit - their ability to rhyme, the speed of their articulation - and by their ability to create outsized personas [sic] with words."[48]

A Wall Street Journal editorial criticized the press for reducing the issue into a dichotomy between right-wing zealots and free thinkers. "But of course, the newspapers defending the 2 Live Crew lyrics ... somehow desist from inflicting them on their readers," it said.[49]

The conservative U.S. News & World Report also took issue with the press's failure to convey to readers the essence of "Nasty." "What we are discussing here is the wild popularity (almost 2 million records sold) of a group that sings about forcing anal sex on a girl and then forcing her to lick excrement," John Leo wrote in an "On Society" column. "The squeamishness of the press about sharing this rather crucial information with readers may be understandable ... But

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[47]Pareles, Jon, "Rap: Slick, Nasty and - Maybe - Hopeful," The New York Times (June 17, 1990), p. E1.
[48]"Too Cruel Live," The New Republic 202 (July 9 & 16), p. 8.
[49]"The Flag and the Community," Wall Street Journal (June 18, 1990), p. A10.

it has distorted the case, making the censors look worse and the rappers look better than they really are."[50] He rapped a "safely abstract" Times editorial that said, "The history of music is the story of innovative, even outrageous styles that interacted, adapted and became mainstream." Leo wondered: "Does this mean that woman-abuse will become conventional and the Times doesn't mind?"[51]

Two months later, Leo reiterated his concerns over the press's self-censorship in the magazine's "On Ideas" column. "[T]he press must not protect readers from crucial news out of niceness," he wrote. "...by implying that 2 Live Crew was merely dealing in 'party record' and 'locker room' language, the press left the impression that the rappers may have been singled out by race, not for recommending physical damage to women."[52] He said the "bad reporting ... broke the tension between legitimate concerns about censorship and artistic freedom, and equally legitimate concerns about shocking images of sexual degradation casually being accepted into the cultural mainstream."[53]

Reader's Digest reprinted a Miami Herald column which charged what writer John Underwood called "Mediaknights" had been "suckered into a phony cause. ... For evil to flourish among otherwise well-intentioned people, it must gain acceptance as something else - something more palatable, something that can deflect the truth.

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[50]Leo, John, "Polluting Our Popular Culture," U.S. News & World Report 109 (July 2, 1990), p. 15.
[51]Ibid.
[52]Leo, "Ugly truths," U.S. World & News Report, p. 23.
[53]Ibid.

Thus when the words of a rap group or a shock comic spew hatred, bigotry and savagery, you don't call it 'filth,' but 'freedom of speech.' Then you can sell it at the store and in the arena, and people will sing along and laugh.' "[54]

Conservative commentator George F. Will slammed the "Nasty" lyrics in a Newsweek column that apologized for its offensive content. He interspersed the column with testimony from the trial of the gang which almost killed the Central Park jogger. "It was fun," one defendant said of the rape. "Where can you get the idea that sexual violence against women is fun?" Will asked. Then he quoted "Nasty:" "To have her walkin' funny we try to abuse it/A big stinking p---y can't do it all/So we try real hard just to bust the walls..."[55] Will said, "[E]veryone dependent on journalism did not learn what the offending words were. Media coverage was characterized by coy abstractness, an obscuring mist of mincing, supercilious descriptions of the lyrics as 'explicit' or 'outrageous' or 'challenging' or 'controversial' or 'provocative.' " Will blamed liberals for encouraging performers such as 2 Live Crew. "When journalism flinches from presenting the raw reality ... there is an undertone of approval." Will dismissed the free-speech argument.. "We legislate against smoking in restaurants; singing "Me So Horny" is a constitutional right. Secondary smoke is carcinogenic; celebration of torn vaginas is 'mere words'," he wrote. "But only a deeply confused

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[54]Underwood, John, "How Nasty Do We Wanna Be?" Reader's Digest 138 (January 1991), p. 105, 106.
[55]Will, George F., "America's Slide Into the Sewer," Newsweek 116 (July 30, 1990), p. 64.

society is more concerned about protecting lungs than minds, trout than black women."[56]

The above analysis shows how the media acted as a watchdog upon itself, with some publications criticizing others on their coverage of "Nasty." As the next section demonstrates, a majority of the commentators gave top priority to protecting 2 Live Crew's right to freedom of expression rather than exploring the social significance of the sexually violent lyrics.

THE FREE SPEECH ISSUE

Virtually all of the publications decried the censorship against 2 Live Crew, regardless of how offended they were by the words. Many publications opposed the censorship in editorials, including the Los Angeles Times,[57] The New York Times,[58] Washington Post[59] and Christian Science Monitor[60] newspapers and Billboard and Rolling Stone magazines.[61] An analysis revealed that while nearly as many publications addressed the misogyny issue as addressed the free speech issue, they published more than twice as many articles focusing on free speech. Ten publications printed 25 opinion pieces

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[56]Ibid.

[57]"Ugly Lyrics, Beautiful Principle," Los Angeles Times (Oct. 5, 1990), p. B5.

[58]"Nasty But Not Obscene," The New York Times (June 18, 1990), p. A20, and "Common Sense for Common Decency," The New York Times (Oct. 23, 1990), p. A13(L).

[59]"Handcuffs for Nasty Talk," Washington Post (June 15, 1990), p. A24, and "Rappers Released," Washington Post (Oct. 28, 1990), p. C6..

[60]"The Rap Flap," Christian Science Monitor (June 20, 1990), p. 20.

[61]"The Issue Is Fear," Rolling Stone 584 (Aug. 9, 1990), p. 24.

emphasizing the free speech aspects of the issue,[62] compared with nine publications publishing 12 opinion pieces focusing on the lyrics' misogyny.[63] Eight publications published comprehensive articles which balanced those concerns.[64] Based solely on those numbers, the Washington Post appeared to offer the greatest amount of coverage and the most balanced coverage of the 2 Live Crew controversy. It published three opinion pieces emphasizing the songs' misogyny, three pieces emphasizing the band's right to free speech and editorialized against the obscenity ban. The New York Times, in contrast, published five articles emphasizing free speech and one discussing the lyrics' misogyny.

Billboard, the music industry's business magazine, editorialized against the "community standards" section of the legal obscenity test after the band was acquitted of obscenity. "From their laughter, it is clear that some jurors found entertainment value in 2 Live crew's lyrics," Billboard said.[65]

Billboard's guest columnists also focused on the first amendment. The editor and publisher of SPIN magazine argued society should not treat obscenity as a crime. "As an abstraction, society can handle obscenity without pain (if not without fuss). As a tangible crime

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[62]They include Billboard (two articles), The Humanist, Los Angeles Times (three articles), The Nation (two articles), New Republic, The New York Times (six articles), Playboy, Rolling Stone (three articles), Village Voice (two articles) and Washington Post (four articles).

[63]They include Billboard, Madamoiselle, National Review, New Republic, Newsweek, Reader's Digest, Time, U.S. News & World Report (two articles), Washington Post (three articles).

[64]They include The Christian Century, The New York Times, Newsweek, People Weekly, Time, U.S. News & World Report, Village Voice and Washington Post.

[65]"Diff-rent Strokes for Diff'rent Folks," Billboard 102 (Nov. 3, 1990) p. 11.

eliciting tangible punishment, however, it becomes a powerful mechanism of suppression. That's why people who value free speech so vigorously fight those who are clearly afraid of it."[66]

Jason S. Berman, president of the Recording Industry Association of America, wrote in an earlier Billboard column that Crew's work passed the legal test for obscenity because the recording as a whole possesses artistic value. He worried about governmental intervention into personal lives. Coupling Crew with concerns about mandatory record labelling, Berman contrasted the suppression of "Nasty" by the American government with the emerging freedom in Eastern Europe. He appealed to patriotism: "We need foot soldiers. Join up. Our anthem, our call to arms, is 'Let Freedom Ring.' "[67] While deploring governmental censorship, he called on the music community to boycott Louisiana if it passed a mandatory music-labelling bill.[68]

Playboy framed the issue soley in terms of the first amendment, arguing the ideas espoused in "Nasty's" lyrics qualify it for constitutional protection. "One can condemn this idea as misogynist, even fascist, but not at the same moment deny its being an idea - indeed, a powerful one. The album is threatening precisely because it has thoughts that are bold and ugly."[69] In a review of "Nasty," Dave

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[66]Guccione, Bob Jr., "Nothing Should Be Legally Obscene," Billboard 102 (Dec. 8, 1990), p. 9.

[67]Berman, Jason S., "Censorship Must Be Opposed," Billboard 102 (July 7, 1990), p. 11.

[68] Ibid. Berman said the music community should reconsider housing the Grammy Hall of Fame in the state, move the 1992 National Association of Recording Merchandisers convention out of New Orleans and "elect not to do business in the state of Louisiana..."

[69]Scheer, Robert, "Does Censorship Kill Brain Cells?" Playboy 37 (October 1990), p. 55, 57.

Marsh described its contents as "adolescent male chauvinism" more amusing than erotic. Marsh added, "But while "Me So Horny" may be a low joke, it remains just that - somebody's sense of humor. That's criminal?"[70]

In a Time cover story on obscene entertainment, Richard Corliss concluded it's up to parents to keep kids away from obscene material. "[T]he government should quit playing hall monitor to blue comics, metal defectives, rap randies - and the real artists among them who, through subtlety or obscenity, will help us navigate our trip into the 21st century."[71]

Several commentators paired the "Nasty" ban with flag burning, which also made headlines in June of 1990. "With both the rap album and flag burning, the proposed cleanup is more dangerous than the pollution," Richard Cohen wrote in the Washington Post op-ed pages. "In attempting to regain control, we lose it to the government censor."[72]

The Nation also fixated on the first amendment issue in a scathing column. "Now they're standing shoulder to shoulder with Lenny Bruce," columnist Gene Santoro quoted Crew's lawyer.[73] He also quoted the ACLU's Florida executive director and noted the Bush Justice Department's increase in obscenity prosecutions created a "chilly climate" for sexual expression.[74] A Los Angeles Times

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[70]Marsh, Dave, "Music," Playboy 37 (August 1990), p. 20.
[71]Corliss, Richard,"X Rated," Time 135(May 7, 1990), p. 92, 99.
[72]Cohen, Richard, "Flag Burners and Raunchy Rappers," Washington Post (June 14, 1990), p. A23.
[73]Santoro, Gene, "How 2 Be Nasty," The Nation 251 (July 2, 1990), p. 4.
[74]Ibid.

columnist lambasted the "crackpot argument" behind the ban. He compared the ban with censorship in pre-glastnost Soviet Union, Nazi Germany and fundamentalist Iran.[75]

Rolling Stone magazine blasted the ban in a rare editorial entitled "The Issue Is Fear" as part of a special four-story package about the "Nasty" situation. The rock music magazine likened the ban to a recent Supreme Court ruling last year limiting abortion funding. "This chill wind has continued to gather force, spreading to our fundamental right of free speech," Rolling Stone warned.[76] "Once the slippery precedent of obscene recorded material is established, what will stop the far right from continuing to redefine the unacceptable 'fringe' of pop music until its power exceeds that of record producers or consumers?"[77]

New York Times critic Pareles focused almost entirely on the first amendment issue. "A New Role for Rock - Fighting Censorship," was the headline above one of his "Pop View" columns. In it, he noted the mythic power suppression confers on popular songs. "Witness the Plastic People of the Universe in Czechoslovakia, whose fans endured police beatings and other reprisals to hear what the band had to say, or the many nueva cancion (new song) performers in Latin America, who eluded censorship with veiled poetic allusions that listeners were eager to decipher," he wrote, elevating Crew to the level of political martyrs.[78]

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[75]Goldberg, "Does the Music Make Them Do It?" p. M4.
[76]"The Issue Is Fear," Rolling Stone , p. 24.
[77]Ibid.
[78]Pareles,"A New Role for Rock...," The New York Times , p. H24.

Newsweek ran a cover story about obscene art that lumped "Nasty" with the obscenity trial of the Robert Mapplethorpe photographs, the related furor regarding National Endowment for the Arts funding and a new rating system for sexually explicit movies. The discussion extended little beyond a conclusion censorship is bad.[79] In a sidebar, however, David Gates wrote Crew leader Campbell is no fun to defend as a free-speech martyr. "His crew's raps are crude, clinical, misogynist and mostly witless. One expert witness testifying to 2 Live Crew's artistic merit was reduced to citing the 'sophisticated' use of such literary devices as 'personification.' Right. Like in that song "Dick Almighty."[80]

The New Republic applauded the "coarse and exploitative rap group's" acquittal in October as notice the American people "do not fear the representation of sex."[81] Nonetheless, it went on to excoriate African-American scholar Prof. Henry Louis Gates Jr.s' testimony on Crew's behalf. "There are few sights sorrier than the sight of an intellectual in solidarity with the street."[82]

Three newspaper editorials applauded Crew's acquittal in October of charges stemming from the nightclub performance. They did not discuss the lyrics' implications. The New York Times paired Crew's acquittal with the acquittal the same week of Cincinnati's

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[79]Mathews, Tom, "Fine Art or Foul?" Newsweek 116 (July 2, 1990), p. 46.

[80]Gates, David with Peter Katel, "The Importance of Being Nasty," Newsweek 116(July 2, 1990), p. 52 .

[81]"Notebook: 1-900-Justice," The New Republic 203 (Nov. 12, 1990), p. 8.

[82]Ibid. Gates wrote a letter to the editor denying he compared 2 Live Crew to Shakespeare. "I did argue that Luther Campbell's outlandish display of black macho made sexism look silly and repellent, not attractive..." Gates, Henry Louis Jr., "Taking the Rap," The New Republic 203(Dec. 3, 1990), p. 4 .

Contemporary Art Center on obscenity charges arising from its display of Robert Mapplethorpe's photographs. The Times editorialized against spending law enforcement dollars on "victimless misdemeanors."[83] The Los Angeles Times compared the ban with an earlier one against James Joyce's Ulysses, noting the first amendment requires tolerance of obnoxious speech, "including the misogyny of the rap group 2 Live Crew."[84] (It neglected to mention Ulysses was ruled literature and thus not obscene in 1934.)[85] The Washington Post noted the language lost its shock value for jurors as the trial wore on. "That's happening to the entire culture, of course," the Post wrote. It noted approvingly that the case shows "this society increasingly tolerates controversial material in the arts."[86]

The sole exception to the anti-censorship advocates was Madamoiselle, a women's fashion magazine, whose columnist Barbara Grizzuti Harrison, one of the few women who wrote on the subject, dismissed the first amendment defense of "Nasty." "As a woman who has experienced sexual violence," Harrison wrote. "I know that these lyrics are tantamount to crying 'Fire!' in a crowded theater - which does not qualify as constitutionally protected speech."[87]

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[83]"Common Sense for Common Decency," The New York Times (Oct. 23, 1990), p. A13.
[84]"Ugly Lyrics, Beautiful Principle," Los Angeles Times (Oct. 5, 1990), p. B5.
[85]United States of America v. One Book Called Ulysses, 72 F.2d 705 (2nd Cir. 1934).
[86]"Rapper Released," Washington Post (Oct. 28, 1990), p. C6.
[87]Harrison, Barbara Grizzuti, "Lewd Music," Madamoiselle 96 (October 1990), p. 116.

But another woman writer decried the obscenity ban. Barbara Dority, executive director of the Washington Coalition Against Censorship and cochair of the Northwest Feminist Anti-Censorship Taskforce, wrote in The Humanist, "These heavy-handed attacks on the freedom of expression of young musicians are direct assaults on everyone's First Amendment rights of free speech and political dissent. *We must not tolerate* government censorship."[88] For Dority, the image of the two black band members "being led away in handcuffs in the middle of the night" conjured the Gestapo. Nowhere in her essay does she address their songs' offhanded misogyny. That the black musicians' plight aroused more empathy in Dority than did the sexual violence against women celebrated in their songs reflected other publications' strong sensitivity to racial aspects compounding the 2 Live Crew case. Some commentators incorporated racial considerations into their defense of 2 Live Crew's banned album. But that racial defense created a backlash, as the next section demonstrates.

RACIAL ISSUES

Many magazines believed "Nasty" was banned because of racism. "It's about one culture, predominantly older and white, that controls the structures of power and about another, younger, black world that has created a medium called rap through which individuals can communicate with one another," Rolling Stone editorialized.[89]

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[88]Dority, Barbara, "The War on Rock and Rap Music," The Humanist 50 (September/October 1990), p. 36.
[89]"The Issue Is Fear," Rolling Stone, p. 24.

Rock critic Dave Marsh, editor of the newsletter Rock & Roll Confidential, echoed those sentiments in People Weekly magazine. "What [this] is about is who has the right to speak in America," he said, "and whether or not people who have non-Euro-American values and nonfundamentalist Christian values have the right to speak in language that like-minded individuals will understand.[90]

Rock manager Danny Goldberg wrote in the Los Angeles Times that a black group which records for an independent black label was singled out for lyrics no more obscene than other entertainment because whites fear rap's power as political and social protest. "Arresting a black rap artist is one way of 'standing up' to young black culture," he wrote.[91] Goldberg, also chairman of the American Civil Liberties Union Foundation of Southern California, was quoted in a Newsweek cover story as saying: "The price we pay for freedom of expression is that some things will be considered vile by some people. But what's vile to a Mormon family in Utah is not vile to a black family in South Central Los Angeles."[92] While apparently an attempt to exonerate 2 Live Crew's misogyny, Goldberg insulted African-Americans, a feat replicated by others in the media.

The Times' Pareles also excused the lyrics as a part of black culture. "Such aspects of black culture as the blues, jail house chants and the rhymed put-downs called the dozens are all devoted

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[90]"Rock, roll and raunch," People Weekly, p. 90.

[91]Goldberg, Danny, "Does the Music Make Them Do It? Looking at Morality in Society," Los Angeles Times (June 17, 1990), p. M4.

[92]Corliss, Time, p. 97.

to comic, hyperbolic verbal conceits, often tied to sexual boasting that is often too raunchy for white mainstream culture," he wrote.[93]

The most inflammatory statements offered in the racial defense of "Nasty" were found in a New York Times op-ed piece by Henry Louis Gates Jr., then a black Duke University professor of African-American studies.[94] "[Censorship] is to art what lynching is to justice," Prof. Gates concluded after explaining that Crew's lyrics are "heavy handed parody" rooted in black culture. "These young artists are acting out, to lively dance music, a parodic exaggeration of the age-old stereotypes of the oversexed black female and male," Gates wrote. "Their exuberant use of hyperbole (phantasmagoric sexual organs, for example) undermines - for anyone fluent in black cultural codes - a too literal minded hearing of the lyrics."[95] Gate said such lyrics grew out of the street tradition of "signifying," where the best signifier (or rapper) invents the most extravagant images. Gates conceded the group's sexism was troubling. "Their sexism is so flagrant, however, that it almost cancels itself out in a hyperbolic war between the sexes."[96]

That racial defense of the "Nasty" lyrics backfired in some quarters. "When you promote 'suck my dick, bitch, and make it puke' into a 'vernacular tradition,' you wound your culture,"[97] The New Republic said. The magazine lamented that "a prominent black

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[93]Pareles,"A Rap Group's Lyrics...," The New York Times, p. C15.

[94]Gates, Henry Louis Jr, "2 Live Crew, Decoded," The New York Times (June 19, 1990), p. A23. He testified as an expert witness for 2 Live Crew in the trial that granted the obscenity ruling. Gates has since moved on to Harvard University.

[95]Ibid.

[96]Ibid.

[97]"Too Cruel Live," The New Republic, p. 8.

intellectual has stepped forward to congratulate these posers, to call them victims and heroes"[98]

Courtland Milloy, a black columnist for The Washington Post, denounced the "demeaning racial defense. ... The perverted acts described by 2 Live Crew are no more cultural traits of poor black people than they are of any racial or economic group," Milloy wrote. He singled out Prof. Gates' comments. "The 2 Live Crew album has nothing to do with black culture, but it does speak volumes about the warped attitudes of its members toward women. ...[T]he songs on the album demonstrate an absence of spirituality as well as a fear and hatred of women."[99]

Another black writer rejecting racial rationalizations for supporting 2 Live Crew was Edward C. Arrendell II, manager of musician Wynston Marsalis. He wrote in an op-ed piece paired with Billboard's editorial supporting the 2 Live Crew band's acquittal that "Crew is not a victim of America's racial double standard. They raise this issue as a ploy to garner support from frustrated black nationalists and white liberals with poor judgment or a guilty conscience. Was Judas Priest black? Rock musicians have been harassed for years ..."[100]

Popular black magazines on the whole ignored the 2 Live Crew controversy. Neither Ebony nor Essence published articles on "Nasty." Jet did cover the issue in several articles between July and

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[98]Ibid.

[99]Milloy, Courtland, "Judge's Rap Against 'Crew' Backfires," Washington Post (June 12, 1990), p. B3.

[100]Arrendell, Edward C. II, "Pornography Degrades Free Speech," Billboard 102(Nov. 3, 1990), p. 11 .

November but most were short news accounts of the legal proceedings. However, a July 2 four-page feature discussed the free speech, racial and sexual issues surrounding the "Nasty" ban. Jet interviewed only a female black entertainment lawyer who labelled as racist efforts to clean up rap lyrics. "What we have here is a group imposing middle-class morals on a pluralistic society now that rap music has filtered to the ears of the moral majority'," Ronda Robinson told the magazine.[101]

Only one publication among those analyzed subjected "Nasty" to what could be construed as an overtly racist analysis. The National Review said the music "is the apotheosis of rape - Willie Horton set to music."[102] It went on: "2 Live Crew betokens the crystallization of another generation: the huge mass of utterly alienated young urban blacks, many of whom regard the infliction of pain as a form of self-assertion and amusement. There is no saying that these poor kids don't know any better. They glory precisely in perversity, in a pleasure that is incomplete until it causes pain and shame."[103]

Doubtless, race did factor into the decision to prosecute 2 Live Crew, but some writers seemed too willing to attribute the entire controversy to a racist conspiracy and too quick to dismiss the lyrics' misogyny. The next section will analyze how publications dealt with the misogynistic aspects of the 2 Live Crew controversy.

SEXUAL ISSUES IN THE 'NASTY' BAN

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[101]"Raunchy Rap Lyrics Stir National Uproar," Jet 78 (July 2, 1990), p. 36-37.
[102]"Underclass Consciousness," National Review 42(Aug. 20, 1990), p. 14 .
[103]Ibid.

A black male writer in the Post said the main issue was neither free speech nor racism. "The real issue is hate-filled music that is abusive of women - especially black women - and an assault on its young audience's budding concepts of good sex, good relationships and good times," Juan Williams wrote in a lengthy "Show" section piece paired with an article which decried the ban as racist.[104]

Arrendell, Wynston Marsalis' manager, also argued the first amendment shouldn't be used to excuse pornography. "Like the Ku Klux Klan, Crew must be tolerated, but their lowlife, ignorant ideas should not be encouraged," he wrote.[105] He indicted black record executives for putting profits above morality. "These individuals' actions have a strong kinship with the African tribes that sold African people into slavery."[106] He suggested a marketing boycott to counter what he called "Crap" groups: black labels should sign only responsible groups and black radio stations should "organize a lifetime boycott of every artist affiliated with the producers and mangers of Crap artists."[107]

Some male writers did believe "Nasty's" misogyny was the key issue. "As a psychiatrist, I used to see psychotic patients who, urged on by voices inside their heads, did crazy and terrible things, psychiatrist and syndicated columnist Charles Krauthammer wrote after Crew was acquitted. .... Now we have legions of kids walking around with the technological equivalent: 2 Live Crew wired by

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[104]Williams, Juan, "The Rap on 2 Live Crew: The Real Crime: Making Heroes of Hate Mongers," Washington Post (June 17, 1990), p. G8. The other article was "The Obscenity Case: Criminalizing Black Culture," by David Mills.
[105]Ibid.
[106]Ibid, p. 84.
[107]Ibid.

Walkman directly into their brains, proposing to 'bust your [expletive for vagina] then break your backbone. ... I wanna see you bleed.' Surprised that a whole generation is busting and breaking and bleeding? Culture has consequences."[108] Krauthammer asserted words can harm. ""Most people, and in particular 2 Live Crew's intellectual defenders, fervently believe in the connection between good art and good society. ... And yet the corollary - if good art can elevate then bad art can degrade - is a proposition they refuse to grasp."[109]

All but a handful of writers were unable to concede any harm existed in "Nasty." They seemed obligated to find some worth in 2 Live Crew's lyrics, which put intelligent people in the position of defending abysmally bad lyrics. An exception was John Underwood. "Social orders are established and laws passed partly to protect people against the sordid influences that demean life and are every bit as harmful as a blow to the head. Most civil-rights laws do exactly that: they seek to uphold the values that united a people in the first place. Not only are such laws based on morality and ethics, they must also distinguish between liberty and license."[110] Underwood connected sexually violent lyrics to real violence against women, citing a University of California at Los Angeles study in which a quarter of the men said they would rape a woman if they knew they could get away with it.[111]

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[108]Krauthammer, Charles, "Culture Has Consequences: The Cost of 2 Live Crews," Washington Post (Oct. 26, 1990), p. A27.
[109]Ibid.
[110]Underwood, "How Nasty?" Reader's Digest, p. 107.
[111]Ibid.

The National Review took to task those who fixated on the first amendment questions the "Nasty" ban posed. "Liberals discuss 2 Live Crew as if it posed only a First Amendment problem, in the manner of Ulysses. This evades the more earthy problem of influence. This stuff is pop culture. It sells in the millions, blaring from boom boxes and car stereos."[112]

A sidebar to Time's cover story on pornography entitled "A Parent's View of Pop Sex and Violence" voiced author Charles P. Alexander's concerns over the lyrics: "Most concerned parents fret not so much about sex as about the combination of sex and violence."[113] Noting how culture spurred drug use among an earlier generation, he wondered how sexually violent messages affected young people's psyches. He described a New Jersey incident where seven teenaged boys sexually assaulted a mentally impaired girl with a baseball bat as friends looked on. "Were they all psychologically disturbed, or were they acting normally in a culture where sexual violence is deemed tolerable, even entertainment?"[114]

John Leo in U.S. News & World Report also focused the "Nasty" message that equated sex with violence. "The real problem, I think, is this: Because of the cultural influence of one not very distinguished rap group, 10 and 12-year-old boys now walk down the street chanting about the joys of damaging a girl's vagina during sex."[115] Rather than reluctantly welcome such messages into the

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[112]"Underclass Consciousness," National Review, p. 14.

[113]Alexander, Charles P., "A Parent's View of Pop Sex and Violence," Time 135 (May 7, 1990), p. 100.

[114]Ibid.

[115]Leo, "Polluting Our Popular Culture," U.S. News & World Report, p. 15.

culture. Leo encouraged people to monitor, complain and boycott to register their displeasure. "Why should our daughters have to grow up in a culture in which musical advice on the domination and abuse of women is accepted as entertainment?"[116]

The Post's Williams was the only commentator who sought out black female sources for comment on "Nasty." He quoted Jewelle Taylor Gibbs, author of Young, Black and Male in America: An Endangered Species: "Censorship is a red herring in this case. The real issue is values, quality of life. I worry most about our young black men who see 2 Live Crew's success and take them as role models - negative, antisocial role models. Their music, their image, is based on degrading women."[117]

Williams also interviewed Dorothy Height, head of the National Council of Negro Women, who said she was concerned with the music's negative impact on young black women, and Marilyn Kern-Foxworth, a Texas A&M professor who studies blacks in media. She said black women failed to protest "Nasty" because they feel victimized. "Too many black women are still saying they see the music as about some other women, not them," she said.[118] Williams also interviewed Stanley Crouch, the black jazz critic for the Village Voice who detests "Nasty." "The central question is how the sadistic, misogynistic, hateful music adds to the problematic attitude already burdening the black lower class in America," Couch said.[119]

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[116]Ibid.
[117]Williams, "The Rap on 2 Live Crew," p. G8.
[118]Ibid.
[119]Ibid.

The Village Voice published a lengthy and detailed account of the Crew members' trial in Fort Lauderdale by black reporter Lisa Jones. For the most part a feature-style account of the legal proceedings, Jones clearly was troubled by the racial defense of the album's celebration of sexual violence. Near the end of her piece she interjected her misgivings: "Something that (Henry Louis) Gates says stays in my head all night long: 'There is no cult of violence. There is no danger at all that these words are being sung.' I wonder if he's seen 2 Live Crew in concert, as I have, and watched them push women to the floor, pour water on them, and chant, 'Summer's Eve, Massengill, bitch wash your stinky pussy!' One of the sad things about black culture, Gates says, is that it's homophobic and sexist. When can we say enough hyperbole, enough parody, this is hateful against women? This means what it says. That language is powerful and destructive? And if we can't say this to artists, because we can never question their intent, who do we bring our complaints to?"[120]

The Times finally addressed black feminism and rap in a July 29 "Pop View" column by Michele Wallace, author of Black Macho and the Myth of the Superwoman. "Like many black feminists, I look on sexism in rap as a necessary evil," Wallace began.[121] She said "rap is a welcome articulation of the economic and social frustration of black youth" but conceded it is "glaringly sexist." "What seems universal is how little male rappers respect sexual intimacy and how little regard they have for the humanity of the black woman,"

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[120]Jones, Lisa, "The Signifying Monkees," Village Voice 36 (Nov. 6, 1990), p. 43, 171.

[121]Wallace, "When Black Feminism Faces The Music...," The New York Times, p. H20.

she said.[122] She explained sexist rap presents a quandary for black women because feminist criticism is considered part of a hostile white culture. "There is a widespread perception in the black community that public criticism of black men constitutes collaborating with a racist society."[123] She criticized both those who would censor the lyrics and those who excuse the misogyny because of its basis in black oral traditions. She hoped the growing number of female rappers would speak out against sexist rap. "What won't subvert rap's sexism is the actions of men; what will is women speaking in their own voice, not just in artificial female ghettos, but with and to men," she concluded."[124]

One woman rapper writing in Mother Jones explained why black women rappers are reticent to challenge the music's sexism. Dominique DiPrima said men control the business, as managers, producers and critics. She added women don't want to increase divisiveness within their ranks. "[W]e, as black men and women, are tired of being polarized by everybody's issues and opinions. At this point rap music is under attack from the media, the police, and the courts. Pressure from the outside makes it much harder to criticize from within."[125] By 1991, women rappers were beginning to do that. "The new female rappers are creating buoyant messages that

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[122]Ibid.

[123]Ibid.

[124]Ibid.

[125]DiPrima, Dominique, "Beat the Rap," Mother Jones 15:32 (September/October 1990), p. 80. DiPrima, using her rap moniker of M.C. Lady "D," quoted one of her songs: R-E-S-P-E-C-T/I do it for you so do it for me/So basic that old time bottom line/Once again defending my sex with a rhyme/Like an Uzi takin' out that bullshit/Sexism sucks and I won't live with it."

transcend the inert boasting so common in male rap," Time noted.[126] Monie Love, Salt-N-Pepa and Queen Latifah are among popular women rappers with a feminist vision. Time quoted the latter's album: "Ladies First there's no/time to rehearse/I'm divine and my mind/expands throughout/the universe."[127]

Beyond those quoted in Williams' piece, women's names were a glaring omission among the op-ed bylines or on the roll of "experts" called upon to comment on the obscenity ruling. Rolling Stone, for instance, polled 35 musicians on their feelings about the obscenity rap; two were women (and all supported the magazine's fervent anticensorship stance).[128]

Black journalist Courtland Milloy of The Washington Post embodied the conflicts inherent in press coverage of banning rap, which is probably why other reporters called him for quotes. "It's futile to try to suppress this thing with court action," he told the Wall Street Journal. "But if this case can be used to get people on the record saying we don't like having young black men talking about abusing women and girls, and by extension themselves, then let the trials begin."[129]

The Christian Century in January published an article notable for its thoughtful analysis of the way the Crew controversy

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[126]Thigpen, David E., "Not for Men Only," Time 137 (May 27, 1991), p. 71 He added a few rappers "giving voice to a vengeful brand of radical black feminism" include BWP (Bytches With Problems), who take on "with fluent vulgarity" date rape, male egos and police brutality.

[127]Ibid,

[128]Neely, Kim, "Rockers Sound Off," Rolling Stone 584 (Aug. 9, 1990), p. 26-27.

[129]Wynter, Leon E., "NAACP Raps 2 Live Crew, Reflecting Division Among Blacks Over the Music," Wall Street Journal (June 21, 1990), p. A16.

intertwined concerns over sex, race and free speech. Quoting verbatim the lyrics, Michael Eric Dyson rejected the racial defense. "I can't write off such lyrics as mere examples of black speech practices that employ bawdy humor to make their point. ... To show how 2 Live Crew employs parody does not suspend the need to subject the group's art to cultural and moral criticism. Their use of parody expresses a point of view about women that is disturbing, not least because they couch their misogyny in humorous terms that fail to envision its lethal consequences for women."[130]

Dyson supported free speech, cautioned against racism and castigated sexism in just more than a page. "Freedom of expression for rappers, even 2 Live Crew, must be protected. By its nature, the right to free speech permits conflicting expressions: those of civil rights activities and Ku Klux Klan terrorists, feminists and misogynists. The right to free expression does not absolve us, however, of the responsibility to oppose an offensive viewpoint or set of cultural practices. Civic responsibility, manifest in civil disobedience, social activism, political resistance and cultural engagement, is the necessary complement to civil rights."[131]

Dyson made some points about the complexity of the issue the majority of the commentators overlooked or ignored. Siding against censorship of offensive expression does not absolve social commentators from their responsibility to censure it. The commentators' shortcomings in the "Nasty" controversy will be

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[130]Dyson, "Sex, Race and Class," The Christian Century, p. 7.
[131]Ibid, p. 8.

analyzed in the conclusion, followed by suggestions on how the press can improve future coverage of related issues.

CONCLUSION

The above examples illustrate several shortcomings by commentators when they write on events involving free speech. Because they are in the business of free expression, columnists and other writers vociferously attack any perceived threat to the first amendment. As demonstrated by the eventual acquittals of 2 Live Crew and the Cincinnati art museum, usually triumphs in the United States, and by its very nature has a forceful and eloquent champion in the media. Women have far fewer such articulate and well-positioned champions. For one thing, the print media remain dominated by men. Nearly 90 percent of all editors are male, and by the late 1980s, 76 percent of newspaper dailies had no female associate editors, executive editors, managing editors, editors, editorial chiefs, or any women in variations of these job titles, according to a poll conducted by the American Society of Newspaper Editors.[132]

The preponderance of pundits who rallied behind "Nasty" in the name of the first amendment often seemed to ignore the damaging attitudes toward women the lyrics espoused. So intent were they on decrying censorship they excused or made light of the songs' misogyny. At times, journalists bent over backwards to justify the lyrics. A nadir in the coverage, and emblematic of the way the press

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[132]Faludi, Susan, Backlash: The Undeclared War Against American Women (New York: Crown Publishers, Inc.) 1991, p. 374.

confused the issues, was the Village Voice's call for first amendment supporters to buy the album; the message was young women or other listeners who objected to the lyrics' sexual violence were unpatriotic censors. Some journalists leaped at the questionable racial defense of the lyrics' nastiness. Ironically, they may have revealed their own racism by claiming violence toward women is an accepted part of black culture.

One observation resulting from this analysis is publications' opinion pages reflect their readership. For Rolling Stone, the sole issue was the infringement upon rock'n'roll. Time offered its older, more middle class readers "A Parent's View of Pop Music and Sex." Madamoiselle spoke up for its female readership when it supported the "Nasty" ban, while the liberal Nation, a chary veteran of the McCarthy era, expressed outrage at any infringement upon free speech. What is disturbing is that some publications such as The Humanist usually aligned with women's rights abandoned those concerns in the 2 Live Crew case. They saw the issue as a dichotomy - pro- or anticensorship - and refused to deal with the complexities of how speech and expression affect the realities of women's lives. Other publications whose point of view could have contributed to the "Nasty" debate remained oddly silent, including Ms., Essence and Ebony magazines.

The discussion of 2 Live Crew lacked a feminist context. A growing feminist contingent has attempted to reconceptualize the problem of pornography as a civil rights issue. They would allow women to seek civil damages against pornographers if they can prove it deprives them of their civil rights. Feminists argue

demeaning depictions of subjugated women promote images of women as sex objects and contribute to the societal subjugation of women.[133] "[T]he challenges to the civil rights law have been abstract arguments about speech, as if women's lives are abstract, as if the harms are abstract, conceded but not real," according to feminist scholar and anti-pornography activist Andrea Dworkin.[134]

Statistics show that violence against women is on the rise: a woman is raped every six minutes in the United States,[135] and one in 11 inner-city teenagers is raped.[136] According to Ms. magazine, 25 percent of college women in one survey experienced rape or attempted rape. In another survey, 15 percent of college men admitted forcing a woman to have sex, and in a third survey 51 percent of men said they would rape if they knew they would get away with it.[137] At current rates, one woman in four will be sexually assaulted in her lifetime.[138]

A growing body of literature contends the mass media's pervasive images of sexual violence have contributed to this increase by desensitizing people to it. "Femicidal atrocity is everywhere normalized, explained as 'joking,' and rendered into standard fantasy fare, from comic books through Nobel prizewinning literature to

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[133]Indianapolis was among several cities which enacted a law against violent pornography in the early 1980s, later found unconstitutional by a federal appeals court. American Booksellers Association v. Hudnut, 721 U.S. 323 (1985)

[134]Dworkin, Andrea, Pornography: Men Possessing Women, (Penguin Books: New York), 1981, p. xxxi.

[135]Gore, Tipper, "Hate, Rape and Rap," Washington Post (Jan. 8, 1990), p. A15. Rape arrests of 13-year-old boys in New York City have increased 200 percent in the past two years. Ibid.

[136] Zinsmeister, Karl, "Growing Up Scared," The Atlantic 265 (June, 1990), p. 50.

[137]"The Killing Numbers," Ms. 1 (September/October 1990), p. 45.

[138]Ibid.

box-office smashes through snuff films."[139] 2 Live Crew's lyrics fit into the sexual paradigm Dworkin describes: "Male sexual power is the substance of culture. It resonates everywhere. The celebration of rape in story, song, and science is the paradigmatic articulation of male sexual power as a cultural absolute."[140] Further, the feminist viewpoint offers a compelling argument that pornographers inhibit women's expression. "[F]or women, the pornographer *is* a censor - he is the thought police, the slayer of words, the silencer, the burner of books, the killer of poets," writes Marianne Wesson.[141] Seeking out the feminist point of view - Dworkin, Catharine MacKinnon and Audre Lorde are just a few names which come to mind - would have contributed to the "Nasty" debate.

The absence of female commentators and sources for comment on the "Nasty" issue, was another disturbing omission since women were the lyrics' subject. In the future, commentators should make sure they seek appropriate sources, such as black women, when writing on issues which affect them. Editors should make a greater effort to find black women to write columns and op-ed pieces commenting on issues that affect them. And women must speak out more - and write more - on these issues.

One obvious problem was the press's poor job of telling readers what the lyrics said. Some of the publications which protested the censorship loudest did the poorest job of telling readers why "Nasty"

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[139]Caputi, Jane, and Russell, Diana E.H., "Femicide: Speaking the Unspeakable," Ms. 1 (September/October 1990), p. 34, 36.

[140]Dworkin, Pornography, p. 23.

[141]Wesson, Marianne, "Sex, Lies and Videotape: The Pornographer as Censor," 66 Wash. L.R. 913, 936 (1991).

earned the dubious distinction of becoming America's first banned album. Their reticence was hypocritical. Publications should be more straightforward about quoting vulgar words before telling readers they aren't so bad. With vulgarity now in the mainstream, the problem of how to treat it in publications won't go away. Editors must find ways to better convey sexually offensive material in their publications so readers are better informed.

The media, so quick to jump on conflicts of interest in other realms, should examine its own inherent conflict of interest whenever challenges to the first amendment are raised. Offensive and nasty expression may be protected by the constitution, but kneejerk reactions to first amendment issues blind the media to overlapping issues of sweeping social significance. Writers should take off their blinders when first amendment questions arise so they can see the bigger picture. Publications should bend over backward to explore why people want to ban something, rather than lump the protestors together as small-minded censors. Publications which failed to to discuss "Nasty" beyond the first-amendment question missed an opportunity to explore the bigger story about what it means when millions of people blithely dance to songs about abusing women. The connection between violence against women and the sexual violence that permeates American culture - of which "Nasty As They Wanna Be" is but one example - needs to be explored and publicized.

The New Republic said it best: "[T]he First Amendment's protection of 2 Live Crew is where the discussion should begin, not where it should end."[142]

[142]"Too Cruel Live," The New Republic, p. 8.

PLAYING WITH FIRE:

AN HISTORICAL AND LEGAL ANALYSIS OF CROSS BURNING FROM THE SCOTTISH HIGHLANDS TO ST. PAUL, MINNESOTA

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The author thanks Prof. Margaret Blanchard, Ph.D., of The University of North Carolina at Chapel Hill for her helpful comments on early drafts of this paper.

Robert A. Viktora had no intentions of creating constitutional history when he and some friends sneaked over a fence long past midnight to burn a cross in the backyard of Russ and Laura Jones, a black couple who recently moved with their five children to a white, working class neighborhood in St. Paul, Minn. He only wanted to scare them, and he succeeded. "If you're black and you see a cross burning, you know it's a threat, and you imagine all the church bombings and lynchings and rapes that have gone before, not so long ago," said Mrs. Jones.[1]

The city used its newly amended hate-crime law for the first time to bring disorderly conduct charges against Viktora, a 17-year-old high school dropout, and Arthur Miller III, 18. The ordinance provided that, "whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, religion or gender, commits disorderly conduct and shall be guilty of a misdemeanor."[2] Miller pleaded guilty and was sentenced to 30 days in jail. But Viktora, also charged with assault in the fourth degree, claimed the hate-crime statute violated his constitutional right to free speech.

On June 22, 1992, the U.S. Supreme Court unanimously agreed, although its members split bitterly in their reasoning.[3] The majority opinion effectively wiped out all hate-crime laws and related campus hate-speech codes by finding it unconstitutional to prohibit hate speech addressed to some groups but not others. Four justices in a concurrence argued vehemently that extremely racist hate speech causes special harms that justify banning it.

The Supreme Court's ruling in *RAV v. S. Paul* ruling is significant because the cross-burning case is at the heart of a growing debate over how much intolerance a free nation must tolerate. Comprising four opinions filling 61 pages, the *RAV* decision marks the first time the Court has addressed hate-crime laws. The justices' philosophical

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[1]Tamar Lewin, *Hate crime is focus of first amendment case*, N.Y. Times, Dec. 1, 1991, at 1, 15.

[2]St. Paul, Minn. Leg. Code Sec. 292.02 (1990).

[3]1992 WL 135564 (U.S.).

split mirrors the passions aroused in recent years by hate-crime laws enacted in response to proliferating hate crime. The debate illustrates the conflict between the constitutional guarantees ensuring free speech and equal protection, a rift so deep it not only splits traditional civil rights allies such as the National Association for the Advancement of Colored People and the American Civil Liberties Union but positions conservatives as free-speech champions and liberals as censors.[4]

This paper looks at one small aspect of the hate-speech debate by examining the historical use of the burning cross as well as the legal system's past treatment of this powerful symbol of hate. After explaining the origins and use of the burning cross as a symbol, this paper focuses on how state and federal legal authorities have dealt with cross burning in the past. It also briefly discusses the emergence of hate-crime laws. The paper concludes by analyzing the Supreme Court decision in *RAV v. St. Paul* and its effect upon cross-burning and other hate-crime laws.

Traditional legal and historical research methods are used throughout the paper. Primary legal sources include state and federal cases on cross burning and related offenses, including the briefs for *RAV* and the decision itself. Other primary sources include newspaper and magazine articles on cross-burning, hate crimes and the *RAV* ruling; Ku Klux Klan publications, and papers and pamphlets on cross-burning and the Klan from the 1920s. Secondary sources include books on the Klan and law journal articles about symbolic speech, anti-mask laws and hate-crime laws.

HISTORY OF THE SYMBOLISM OF CROSS-BURNING

Today, cross burning usually conjures the Ku Klux Klan's violent racism. Why that zealously Christian organization desecrated the cross is perplexing until one learns the symbol's meaning stretches back across centuries to the Scottish Highlands' pagan clans. Sir Walter Scott's 1830 poem "The Lady of the Lake" refers to "the fatal sign" the clan chieftains used to call their members to battle:

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[4]Tony Mauro, *Free speech is now conservatives' cause*, USA Today, June 23, 1992, at 8A.

Yet live there still who can remember well
How, when a mountain chief his bugle blew,
Both field and forest, dingle, cliff, and dell,
And solitary heath, the signal know;
And fast the faithful clan around him drew,
What time, the warning note was
keenly wound,
While clamorous war-pipes yell'd the
gathering sound;
And while the Fiery Cross glanced,
like a meteor, round.[5]

Later the poet writes, "When flits this Cross from man to man,/ Uich-Alpine's summons to his clan,/ Burst be the ear that fails to heed! /Palsied the foot that shuns the speed!"[6] The ancient fiery cross differed from its twentieth-century incarnation, according to the poet's notes accompanying the poem. When an emergency arose, a chieftain slew a goat and built a cross of light wood, searing its three top points in the fire and extinguishing them in the animal's blood. A messenger raced with the cross to the next hamlet, presenting it with a single word implying the place of rendezvous. The recipient forwarded the cross with another messenger, until all men aged 16 to 60 years old armed for war met at the rendezvous. "He who failed to appear suffered the extremities of fire and sword, which were emblematically denounced to the disobedient by the bloody and burnt marks upon this warlike signal," Scott wrote.[7] The fiery cross also was called the "Crean Tarigh" or Cross of Shame because failing to heed the call inferred infamy.

A grotesque version of the Highlanders' signal appeared in The Clansman, a 1905 racist potboiler by North Carolina actor, minister and politician Thomas Dixon Jr. alleging the Reconstruction South was

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[5] *The Lady of the Lake*, in J. Logie Robertson, Ed., The Poetical Works of Sir Walter Scott , 229 (1913).

[6] Id. at 233.

[7] Id. at 287. Scott also quoted a 1658 history of Scandinavia that described how those tribes sounded a similar alarm by carrying a burnt staff with a cord attached to it (signifying that those who failed to respond would be hanged and their houses burnt). Id. 287-288.

saved from rapacious blacks by the "reincarnated souls of the Clansmen of Old Scotland." After former slave Gus rapes heroine Marion Cameron and her mother, the women leap to their deaths off a riverside cliff. When the clansmen capture Gus, bereaved Dr. Cameron brings the clansmen a flask filled with river water and blood-stained sand from the spot where his wife and daughter died. After Cameron ties two pieces of lightwood into the form of a cross, the grand cyclops (leader) lights its three upper ends and holds it blazing in his hands, the beaten ex-slave at his feet, while announcing the clan will dump Gus' dead body on the lieutenant governor's lawn. The grand cyclops then dispatches a messenger to gather other clansmen:

> "In olden times when the Chieftain of our people summoned the clan on an errand of life and death, the Fiery Cross, extinguished in sacrificial blood, was sent by swift courier from village to village. This call was never made in vain, nor will it be to-night in the new world. Here, on this spot made holy ground by the blood of those we hold dearer than life, I raise the ancient symbol of an unconquered race of men--"
>
> High above his head in the darkness of the cave he lifted the blazing emblem --
>
> "The Fiery Cross of old Scotland's hills! I quench its flames in the sweetest blood that ever stained the sands of Time."
>
> He dipped its ends in the silver cup, extinguished the fire, and handed the charred symbol to the courier, who quickly disappeared.[8]

D.W. Griffith changed the traditional symbol when in 1915 he transformed Dixon's book into the first movie megahit, "The Birth of a Nation."[9] Ironically, that film inspired one of the first organized attempts to ban hate speech when the NAACP launched a campaign

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[8]Thomas Dixon Jr., The Clansman, An Historical Romance of the Ku Klux Klan, 324-325, (1905). The original edition includes a full-page, black-and-white illustration by Arthur I. Keeler of the scene quoted above, and the red binding is inscribed with a fiery cross.

[9]David M. Chalmers, Hooded Americanism: The First Century of the Ku Klux Klan 1865-1965, 27, (1965). The movie grossed almost $18 million. Id.

to stop its screening because of its racist depiction of blacks.[10] In the film, a crude cross of branches blazes as the clan declares Gus guilty and drags him off to his death. The silent screen displays the quote about quenching with Margaret's blood the "ancient symbol of an unconquered race." Several more crosses continue to blaze as a rider gallops off with the charred cross. Other small crosses remain ablaze in the hands of hooded and robed horseback riders summoning the clans to combat rioting ex-slaves.[11] The dramatic cinematic image of the burning cross stirred millions of people.

In reality, the original Ku Klux Klan burned no crosses, according to historian Wyn Craig Wade.[12] Its aims were to alleviate the boredom of a handful of ex-confederate soldiers in Pulaski, Tenn., who called themselves Ku Klux, from the Greek word "kuklos" for circle, and Klan, because they were all Scottish-Irish.[13] They created secret codes and signs and colorful, grotesque costumes for themselves and their horses. Over the next few years as Klans cropped up across the South, their secrecy and ceremony enthralled the public. Cadres donned in white hoods and robes astride robed horses with muffled hoofs paraded after dark in small towns. Silent except for a system of whistle signals, the Klan paraded in military fashion before slipping into the darkness.[14] Soon it moved from pranks and pageantry to violence as Klansmen intimidated freed slaves. In Louisiana alone, 2,000 persons were reported killed or injured by the Klan in 1868.[15] Instead of crosses burned in their

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[10]Hosoon Chang, *The attempt to censor racist speech: the NAACP's protests against* The Birth of a Nation, unpublished paper, 1992. The censorship campaign was largely unsuccessful, although St. Paul's city government revoked the license of a theater that refused to cut the rape scene. Bainbridge v. City of Minneapolis, 154 N.W. 964 (1915)

[11]THE BIRTH OF A NATION (Hollywood, Calif.: Hollywood Homes Theatre 1980). In this edited version of the film, the rape scene is eliminated, and Margaret Cameron hurls herself off a cliff before Gus catches her.

[12]Wyn Craig Wade, The Fiery Cross, 146, (1987).

[13]D.L. Wilson, *The Ku Klux Klan: Its Origins, Growth and Disbandment*, The Century Illustrated Monthly Magazine, 398, (July 1884), Southern Pamphlets, Rare Book Collection, Wilson Library, University of North Carolina at Chapel Hill.

[14]Eyre Damer, When the Ku Klux Rode, 1912.

[15]*The Old Ku Klux Klan* , The Ku Klux Klan Secrets Exposed, 26, pamphlet, W.D.Robinson papers, Southern Historical Collection, UNC-CH.

yards, targeted blacks received notes bearing the Klan's signature skull and crossbones (and sometimes a coffin) as warnings, or the Klan left behind similar signs "flapping on a tree or fencepost" announcing its responsibility for tyrannous acts.[16] The federal Ku Klux Acts in the 1870s outlawed the Klan, and its leaders officially disbanded it in 1886.[17]

In 1915, however, Griffith's fiery cross ignited the imagination of William Joseph Simmons. A professional fraternal organizer who spent years planning the Klan's revival, Simmons concocted the Klan's elaborate vocabulary of words beginning with "KL," such as the offices of klaliff (vice president), kludd (chaplain) and kligrapp (secretary).[18] Simmons also contrived secret klonversation: "AYAK?" (Are you a Klansman?) "AKIA." (A Klansman I am.)[19] Simmons launched his new fraternal order after a mob lynched Leo Frank, an Atlanta Jewish factory owner convicted of the rape and murder of 14-year-old Mary Phagan.[20] The so-called Knights of Mary Phagan formed the nucleus for the Knights of the Ku Klux Klan Inc. that Simmons chartered two months later. "His new Ku Klux Klan opposed everything that Frank had personified: urbanization, industrialization and foreignness."[21] On Thanksgiving night, two weeks before the Atlanta premiere of "The Birth of a Nation," Simmons celebrated the revived Klan's birth with 15 followers by driving to the summit of Stone Mountain to light a 16-foot, kerosene-drenched cross of pine he earlier had carried on his back up the 1,780-foot hunk of

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[16]Id. at 27.

[17]Wilson, Century, at 410.

[18]Constitution and Laws of the Knights of the Ku Klux Klan Inc., 59, (1921). Southern Pamphlets, Rare Book Collection, UNC-CH.

[19]Henry P. Fry, The Modern Ku Klux Klan, 91, (1922).

[20]Leo Frank's case also inspired the creation of the Anti-Defamation League of B'nai B'rith in 1913; the League investigated the case for 65 years before winning a posthumous pardon for Frank following a witness' deathbed confession. Robert Seitz Frey and Nancy Thompson-Kelly, The Silent and the Damned , 136, (1988).

[21]Leonard Dinnerstein, The Leo Frank Case, 150, (1968). Simmons claimed three charter members had belonged to the original Klan, in Constitution, *supra* note 18, at 90.

granite.[22] On a boulder altar Simmons placed the Bible, struck a match and lighted the cross.

> "And thus," says Simmons in his characteristic high-flown language, "on the mountain top that night at the midnight hour, while men braved the surging blasts of wild wintry winds and endured a temperature far below freezing [a *World* reporter was unkind enough to consult the weather bureau record for that night and found the minimum temperature to be only forty-five degrees], bathed in the sacred glow of the fiery cross, the Invisible Empire was called from its slumber of half a century to take up a new task and fulfill a new mission for humanity's good. ..."[23]

The Klan grew through the early 1920s. By 1924, membership reached four million people for several reasons: antipathy toward millions of foreign-speaking Catholic immigrants; resistance to modernism; resentment toward black citizens returned from World War I eager for equality, and a poor economy. "To these factors is to be added ennui: pure and simple boredom," noted Century magazine.[24] The Klan became a national political and social force.[25] Infused with a peculiar Christianity, its "kreed" was devoted to white supremacy and the "sublime principles of a pure Americanism. ..."[26]

Cross burning played a crucial role in the highly ritualized, reincarnated Klan, whose official newspaper was *The Fiery Cross.*[27]

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[22]One historian who wrote about the Frank case said a "huge cross seen throughout the city" commemorating the lynching was burned atop Stone Mountain by the Knights of Mary Phagan on Oct. 16, 1915. Harry Golden, A Little Girl Is Dead, 300, (1965). There is no mention of a burning cross on either that night or on Thanksgiving in the Atlanta Constitution newspaper. Simmons also claimed in a 1921 edition of the Klan Constitution that the Reconstruction Klan celebrated its first anniversary May 6, 1866, with "concluding exercises at midnight" on Stone Mountain's summit. In Constitution, *supra* note 18, at 90-91. However, no other 20th-century Klan historians whose work I read describe such a pilgrimage.

[23]John Moffatt Mecklin, The Ku Klux Klan: A Study of the American Mind, 5, (1924).

[24] Frank Tannenbaum, *The Ku Klux Klan: Its Social Origins in the South*, Century, April 1923, at 877. Southern Pamphlets, UNC-CH.

[25]Arnold S. Rice, The Ku Klux Klan in American Politics, 14, (1972).

[26]Stanley Frost, The Challenge of the Klan, 54, (1923).

[27]Rice, Politics 64.

Simmons illustrated the cover of the Kloran (constitution) booklet with a robed, rearing horse carrying a costumed Klansman wielding a fiery cross above his head, as in "Birth of a Nation."[28] Inside, the Kloran spells out in great detail and diagrams the complicated and verbose opening ceremony, a significant part of which occurs when the night-hawk places the cross in front of the altar and lights it.[29] Before opening the meeting the Exalted Cyclops begins this exchange:

> E.C.: Faithful Klokard, why the fiery cross?
> Klokard: Sir, it is the emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused.
> E.C.: My Terrors and Klansmen, what means the fiery cross:
> All: We serve and sacrifice for our opening devotions.[30]

The initiation ceremony was even more elaborate. Lights off inside the klavern (meeting hall) while the initiates prayed outside the door, the Klansmen donned their costumes, and the night-hawk lit the cross. Klan manuals picture a small cross illuminated by burning candles at its three top points.[31] After parading in silence around the klavern behind the night-hawk's uplifted fiery cross, the initiates heard long speeches by the Klan's many officers before the night-hawk moved to the altar, where he held the fiery cross aloft throughout the ceremony. Kneeling on one knee, initiates were told by the Exalted Cyclops: "Sirs: 'Neath the uplifted fiery cross which by its holy light looks down upon you to bless with its sacred traditions

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[28] Kloran: Knights of the Ku Klux Klan (1916). Southern Pamphlets, UNC-CH. "The fiery cross" is written just above the symbol, difficult to discern on the 3-inch by 6-inch pamphlet.

[29] The night-hawk was custodian of the cross, carrying it in all ceremonies and klavalcades. Id. at 54.

[30] Id. at 12.

[31] K-Duo Bulletin No 2.A, *General Instructions, Uncharted Local Organizations, Knights of Kamellia or K-Duo (Primary Order), Knights of Ku Klux Klan Inc.*, Jan. 1, 1925, at 9. Rare Books Room, Duke U. The altar also held an American flag, a copy of the Kloran, a Bible, a baldric (sash), chalice and sword. The cross was placed to touch the tip of the sword. A second American flag stood nearby on a pole. Id.

of the past, - I dedicate you. ..." He dripped water on their backs, they prayed, all rose, and the Klansmen lifted their hoods to greet them under the cross.[32]

The Highlanders' traditional symbol also was revived in verbal form. When an illegal activity was planned, the kligrapp (secretary) sent each member chosen to perform the deed a "fiery cross summons." A former Nebraskan Kleagle published a copy of such a summons addressed to a member by his Klan number:

> **The Solemn Summons of the Fiery Cross.**
>
> K.159: By this fiery cross you are hereby seriously summoned to be at an extraordinary Konklave to be held next Tuesday at 8 o'clock p.m. in regular Klavern. Nothing but a providential hindrance can legally justify your failure to be present. The time is limited, therefore be prompt.
>
> Duty, with all the justice of her unquestionable authority, calls; her behest you will meet promptly. The call is imperative.
>
> Signed by ----------
> Your Exalted Cyclops
> By Mandate of His Majesty,
> the Imperial Wizard.
>
> Read this carefully, note place, day and hour, then completely destroy this.[33]

According to the reformed kleagle, the Klan oath compelled the klansman to respond; failure to uphold the oath meant "disgrace, dishonor and death," much like the ancient Highlanders' symbol. And Stetson Kennedy opened his famed 1954 account, I Rode With the Ku Klux Klan, with his receipt by telephone of a "fiery summons" to his initiation atop Stone Mountain.[34] As Kennedy's account demonstrates, the pomp of organized initiations soon gave way to

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[32]Id. at 41.

[33]Edgar Iving Fuller, proof sheet from unidentified newspaper, W.D. Robinson papers, UNC-CH.

[34]Stetson Kennedy, I rode with the Ku Klux Klan, 1, (1954).

less constrained outdoor rituals featuring large crosses engulfed in flames.[35] The effect was akin to a religious experience; members acquired a feeling of "spirituality of kneeling in prayer before burning crosses" and shared a "feeling of power and notoriety from participating in cross-burnings and parades."[36] Klan officials conducted cross burnings with care to avoid controversy. One memo from an Ohio Klavern said:

> No person or persons shall burn a cross or crosses without first securing permission of the Exalted Cyclops, and then only will permission be granted by the Exalted Cyclops when he is satisfied that the burning of a cross or crosses is not in violation of any city ordinance. After a city permit if obtained for the burning of same, where required, and the cross is to be burned on private property, the permission of the owner must first be secured in writing.[37]

Nevertheless, indiscriminate cross-burnings proliferated, warning their targets the Klan was watching. In 1923, one Klan watcher noted that like the mask, costume and other Klan regalia, the cross symbolized "the mark of the terroristic purposes of the old Klan."[38] The Klan burned crosses to symbolize opposition to any behavior it deemed un-American. Virulently anti-Catholic, it lit crosses on St. Patrick's Day in 1924 in Youngstown, Ohio, sparking a near riot.[39] In a Utah mining town, the Klan burned a cross to show its opposition to a Greek immigrant marrying a local woman.[40] At the University of Southern California, it burned a cross in front of a

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[35]"The initiation services are held after midnight, with a flaming cross, an American flag, a sword or dagger, and a Bible ...", *How the Klan Gets Members*, The Secrets of the Ku Klux Klan Exposed, pamphlet p. 16, W.D.Robinson papers, Southern Historical Collection, UNC-CH.

[36]Larry R Gerlach, Blazing Crosses in Zion: the Ku Klux Klan in Utah, 6, (1982).

[37]Wade, Fiery Cross, at 185.

[38]Frost, Challenge, at 43.

[39]William D. Jenkins, Steel Valley Klan: The Ku Klux Klan in Ohio's Mahoning Valley, 112, (1990).

[40]Gerlach, Zion, at 79.

Jewish fraternity house.[41] It burned a cross in front of a dance hall to protest its innovation of a glass prism fixture on the ceiling (as in today's discos). The dance hall put back its old light.[42] Labor organizers at a Greenville, S.C., textile plant found crosses burning near their homes with notes calling them Communists.[43] On Oct. 1, 1937, a spate of crosses illuminated northern skies when newly appointed Supreme Court Justice Hugo L. Black of Alabama gave a radio address about his days in the Klan.[44] In Colorado, 200 Klansmen burned a cross on the lawn of a woman convicted of child abuse.[45] Just before World War II, cross burnings marking the perimeter of a low-income housing project accompanied the arson of Miami's first black residents' homes.[46] In 1948, the editor of the *Milledgeville (Ga.) Union Recorder* accused the Klan of threatening freedom of the press when it set ablaze a cross in front of his home.[47]

A cross ablaze in one's yard was no idle threat. Klansmen shot, hanged, beat, whipped, branded, raped, tar-and-feathered, castrated and generally terrorized anyone they perceived as a threat. For the year following October of 1920, a Pulitzer Prize-winning series by the *New York World* reported the Klan responsible for four killings, one mutilation, one branding with acid, five kidnappings, twenty-seven tar-and-feather parties, forty-three individuals warned to leave town or otherwise threatened, forty-one floggings, fourteen communities threatened by posters and sixteen parades of masked men with warning placards.[48] By 1928, Klan membership had dwindled dramatically in reaction to this violence. An edict from the Imperial Wizard on April 17, 1940 bowed to public criticism and

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[41]Wade, Fiery Cross, at 279.
[42]Gerlach, Zion, at. 84.
[43]Rice, Politics, at 103.
[44]Id. at 92.
[45]Robert Alan Goldberg, Hooded Empire: The Ku Klux Klan in Colorado, 114, (1981).
[46]Kennedy, I Rode, at 226-227.
[47]Rice, Politics, at 110. Ten citizens put up a $1,000 reward for the cross burners' capture.
[48]Mecklin, American Mind, at 9. The Klan denied involvement in these incidents. Id.

forbade wearing the hood and restricted cross burning to formal ceremonies.[49]

But the burning cross never was extinguished. In 1945, Klansmen mixed hundreds of barrels of fuel oil with sand in niches on the face of ever-popular Stone Mountain to form a cross 300 feet long "just to let the niggers know the war is over and that the Klan is back on the market."[50] When the Supreme Court handed down 1954's desegregation order in *Brown v. Board of Education*, Stone Mountain again proved a focal point: 1,500 persons climbed its granite summit for a huge cross-burning ceremony in 1956.[51] During the last weekend of March 1960, thousands of crosses burned in four southern states to protest Congress' passage of a civil rights bill,[52] while a report released around the same time reported 530 cases of Klan violence during the four years following *Brown*.[53] "Combining secrecy and shock appeal with a ritualistic symbol of hate, cross burnings are designed to produce maximum intimidation - and they typically achieve it," says the Klanwatch Intelligence Report, a publication of the Southern Poverty Law Center that has tracked hate crimes including cross-burning for more than a decade. "Usually directed at minority families who have 'violated' a lingering bastion of segregation - the white neighborhood - cross burnings call up images of organized white supremacist groups, especially the Ku Klux Klan."[54]

Its history shows that cross burning has evolved into a potent and popular symbol of hate. In 1991, several convicted cross burners contended cross burning is symbolic expression, also called expressive conduct, that is protected under the first amendment.

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[49]Rice, Politics, at 107.

[50]Stetson Kennedy, Southern Exposure, 213, (1946).

[51]Wade, Fiery Cross, at 305.

[52]*What the 'Sit Ins' are Stirring Up*, U.S. News & World Report 48 (April 18, 1960), at 52, 54. One hundred crosses burned in one Alabama city. Id.

[53]Id. at 56. The study was published by the Southern Regional Council, the American Friends Service Committee and the National Council of Churches of Christ.

[54]*Terrorism Burning Brightly*, Klanwatch Intelligence Report #52 (October 1990), at 6.

CROSS BURNING AS SYMBOLIC EXPRESSION

Only in the past year have courts heard first amendment challenges to cross burnings; before *RAV*, all but one had failed. A review of federal and state court cases shows a judicial consensus that cross burning on private property is intimidating criminal conduct. For example, cross burnings, along with bombings and arson were cited as a part of a pattern of intimidation cited when a district court ordered Brownsville Tenn., to augment its desegregation plans.[55] A Kansas victim told a state appeals court he interpreted a cross burning on his lawn as a threat: "[I]t said the defendant is capable of coming onto the property even during the waking hours when traffic is about, when neighbors are on the streets, when the home is obviously occupied. It thus gives a message that cross-burners are capable of coming back later and doing something more serious."[56] The Eighth Circuit has found uninvited cross burning on

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[55]U.S. v. Haywood County Board of Education, 271 F.Supp. 460 (W.D. Tenn.) 1967). Other examples of how courts have treated cross burning as criminal threats include: a federal district court issuing a 1965 injunction protecting Louisiana blacks from the "absolute evil" of the local Klan found the imagery of the burning cross inextricably bound with the Klan. U.S. v. Original Knights of the Ku Klux Klan, 250 F.Supp. 330, (1965). Cross burnings also were cited in a federal injunction preventing interference with school integration in Alabama after numerous blacks testified they were threatened. "This parent and others found that crosses were burned in the vicinity of their homes and the letters 'KKK' emblazoned in the road at the spot their children boarded the desegregated school bus. The cross-burnings were sometimes accompanied by the repeated discharge of firearms."U.S. v. Crenshaw County United of United Klans of America, 290 F. Supp. 181, 183 (M.D. Al. 1968). Cross burnings also were cited as evidence that black men failed to register to vote out of fear in Mississippi in 1974. Ford v. Hollowell, 385 F. Supp. 1392 (N.D. Miss. W.D. 1974). An injunction preventing the local KKK from intimidating Vietnamese fishermen in Texas in 1981, which included shootings and burning Vietnamese boats, referred to cross burning as a part of the Klan's campaign. Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan, 518 F.Supp. 993 (S.D. Texas 1981). Testimony in a 1991 federal case indicated the burning cross remains a symbol of terror. "Upon seeing the cross, the mother felt feelings of frustration and intimidation and feared for her husband's life," the Ninth Circuit said of a California family awakened at 4:30 a.m. by noise and an orange glow outside their windows. "She testified what the burning cross symbolized to her as a black American: 'Nothing good. Murder, hanging, rape, lynching. Just anything bad that you can name. It's the worst thing that could happen to a person.' " U.S. v. Skillman, 922 F.2d 1370, 1378 (9th Cir. 1991).

[56](State of Kansas v. Miller, 629 P.2d. 748, 750 (C.A. Kans. 1981).

private property an "overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence against black people."[57]

On the other hand, courts have been more tolerant of cross burning as part of ceremonies conducted with the property owners' permission. In 1969's *Brandenburg v. Ohio*, a case featuring burning crosses in a videotaped Klan rally on a farm whose owner approved the gathering,[58] the U.S. Supreme Court overturned the Klansmen's conviction under the Ohio Criminal Syndicalism statute on the grounds the first amendment protects mere advocacy of action as well as assembly to advocate action. The exception is "inciting or producing imminent lawless action," which the Court ruled is unprotected.[59]

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[57]U.S. v. Lee, 935 F.2d 952, 956 (8th Cir. 1991).

[58]395 U.S. 444, (1969). The Supreme Court first considered the Klan's first amendment rights in 1928. In *Bryant v. Zimmerman*, the Court upheld a New York Law aimed at eradicating the Klan which required associations with an oath-bound membership to file membership lists. 278 U.S. 63 (1928). When the Court ruled such lists unconstitutional infringements upon rights of association and free speech in NAACP v. Alabama, it excepted lawless organizations such as the Klan. 357 U.S. 449, 465-66 (1958).

[59]Id. In a 1991 case strikingly similar to the circumstances in *Brandenburg*, White Aryan Resistance leader Tom Metzger was found guilty of misdemeanor unlawful assembly for his role in a 1983 cross burning An investigative reporter filmed Metzger and some 20 other men in KKK costumes who, on private property with the owners' permission, set ablaze a cross, chanted racist slogans and raised their arms in Nazi salutes. The jury failed to reach a verdict on a more serious felony conspiracy charge and a misdemeanor charge of unlawful burning. Metzger was fined $200, sentenced to six months in jail and ordered to perform 200 hours of community service with organizations that work with minorities. Metzger unsuccessfully argued the prosecution violated his rights to free speech and association because part of Metzger's sentence forbade him from associating with white supremacist groups. Tracy Wilkinson, *Metzger, 2 others get 6-month jail terms*, L.A. Times, Dec. 3, 1991, at B1, B4. Rights to association have come up in other recent hate-crime cases. Also in December of 1991, an Iowa man unsuccessfully appealed on rights-to-association grounds parole restrictions following his conviction of of third-degree arson in connection with a cross burning. He said one of the restrictions violated his constitutional right to association because it prohibited him from associating with three men involved in white-rights activities. Steve Webber, *Corken approves of Lightfoot ruling*, Dubuque Telegraph Herald, Dec. 28, 1991, at 1. The U.S. Supreme Court is deciding another case this term involving hate crime and first amendment rights to association. The appellant claims his right to association was violated when during the penalty phase of his murder trial his membership in a white supremacist gang was used as evidence of aggravated circumstances to support

Even if cross burning is considered to be expressive conduct, the government may regulate it under certain circumstances. Numerous Supreme Court decisions have protected expressive conduct even if offends,[60] but in *U.S. v. O'Brien*, a case dealing with a draft-card burner protesting the Vietnam War, the Court ruled government can regulate the conduct aspects of symbolic expression if the regulation passes a four-part test. The regulation must be:1.) content neutral; 2.) serve a significant governmental interest; 3.) narrowly tailored, and 4.) leave open alternative channels of communication.[61]

The few courts that have considered over the past year or so whether cross-burning is symbolic expression have rejected the claim in all but one instance. For instance, a trial judge in Dubuque, Iowa, in February of 1992 rejected a cross burner's motion to dismiss his case on free-speech grounds.[62] The Eighth Circuit in August of 1991 rejected Bruce Roy Lee's argument he was exercising his rights to free speech when he burned a cross across from an apartment complex to symbolize his displeasure that the building housed blacks. The court said the federal civil-rights law under which he was prosecuted passed the *O'Brien* test. "[S]ection 241 does not prohibit Lee from conspiring to burn a cross to convey an offensive message or a message of racial hatred. Rather, the statute prohibits Lee from conspiring to burn a cross to threaten or intimidate targeted individuals in the exercise of their federally guaranteed right to rent and occupy a dwelling."[63] However, in April of 1991 a family-court

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giving him the death penalty. *Dawson v. Delaware*, No. 90-6704, 60 LW 3535 (Feb. 4, 1992.)

[60]Stromberg v. California, 310 U.S. 88 (1940) (display of red flag protected); Brown v. Louisiana, 383 U.S. 131 (silent sit-in is protected expression); Tinker v. Des Moines Independent Community School district, 393 U.S. 503 (1969) (wearing armbands to protest war is protected expression); Cohen v. California, 403 U.S. 15 (1971) (jacket bearing words "Fuck the draft" is protected expression); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning is protected expression).

[61]391 U.S. 367 (1968).

[62] Dean Dickel, *Allen trial set to begin; judge denies dismissal*, Dubuque Telegraph Herald, (Feb. 5, 1992) at 3A. The man must stand trial on charges stemming from the cross burning of possession of explosive or incendiary materials or devices, which carries a penalty of ten years in prison and/or a $10,000 fine. Id.

[63]U.S. v. Lee, 935 F.2d 952 , 955 (8th Cir. 1991). Also in the summer of 1991, a federal district court rejected the claim of an Illinois man that his free-speech

judge said Virginia's cross-burning law was unconstitutionally overbroad when he dropped charges against a 16-year-old student who set a cross ablaze on his high school lawn after a week of racial incidents.[64] The judge compared the cross burning to flag burning, found constitutionally protected in *Texas v. Johnson*.[65]

In contrast, a 1991 state appeal court ruling that Virginia's anti-mask law is constitutional bodes well for laws prohibiting cross burning. The law was one of about a dozen anti-mask laws enacted by numerous states in an attempt to combat the Ku Klux Klan. The court found the Klan mask added nothing "save fear and intimidation" to the symbolic message of the Klan hood and robe, and even if mask-wearing did constitute expression, the statute passed the *O'Brien* test because it served a compelling state interest to keep communities "free from violence."[66] These judicial pronouncements on the constitutionality of anti-mask laws indicate laws prohibiting cross burning also are constitutional, since in both cases the courts must find expressive conduct that intimidates is unprotected.

Despite these recent challenges to cross-burning convictions on first-amendment grounds, it is an act that courts and legislators long

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rights were violated by his conviction for burning two crosses in front of the home of two white women with black friends. United States v. Hayward, 772 F.Supp. 399 (N.D. Ill. 1991). In his closing arguments, a federal prosecutor called cross burnings "unmistakable symbols of racial intimidation." O'Connor, Matt, *Cousins are convicted of '89 cross-burnings*, Chicago Tribune, (June 11, 1991), Sec. 2D, at 7.

[64]DeNeen L. Brown, *Judge drops cross-burning case in Va.*, Wash. Post, April 20, 1991, at A1.

[65]491 U.S. 397 (1989).

[66]Hernandez v. Virginia, 406 S.E.2d 398, 400-401 (C.App.Va. 1991). In 1990, a Georgia court also ruled constitutional that state's ban on Ku Klux Klan masks after applying the *O'Brien* test. Klansman Shade Miller Jr. had claimed the law violated his freedom of speech and association. State v. Miller, 398 S.E.2d 547, 549, 551 (1990). The Georgia Supreme Court ruled mask-wearing by the Klan an intimidating form of conduct, overruling a lower-court judge who called the Klan a "persecuted group" whose free speech rights might depend on anonymity. Peter Applebome, *Ga. ban on KKK hoods is upheld*, The (Raleigh, N.C.) News & Observer, (Dec. 9, 1990), at 2J. However, the Klan that same year won a case striking down a municipal anti-mask law on first amendment grounds in Pulaski, Tenn. A federal district court ruled the law unconstitutional because it dealt with the offensiveness of an idea. Knights of the Ku Klux Klan v. Martin Luther King Jr., Worshippers, 735 F.Supp. 745 (M.D. Tenn. 1990). A Florida court also struck down as overbroad its anti-mask law. Applebome, *Ga. ban*, News & Observer, 2J.

have treated as illegal conduct when occurring on private property without the owners' permission. As the following section illustrates, state approaches to prosecuting cross burning are almost as numerous as the laws on the books.

STATE APPROACHES TO PROSECUTING CROSS-BURNING

A review of state statutes illustrates the wide range of approaches available to punish uninvited cross burning on private property - as in the *RAV* case - without implicating the first amendment. However, the states are divided on whether public cross burning is permissible: Six states specifically forbid burning crosses in public places if the intent is to intimidate or harass;[67] five states and the District of Columbia appear to limit prosecution to crosses burned on private property without the owners' permission;[68] and three make no distinction.[69] Four states, including Montana,[70] Idaho,[71] New Jersey[72] and Washington[73] as well as the District of

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[67]Florida, Maryland, New Jersey, North Carolina, South Carolina and Virginia.
[68]Arizona, California, Idaho, Montana and Rhode Island and the District of Columbia.
[69]Georgia, Vermont and Washington.
[70]Mont. Code Ann. 45-5-221. (1)A person commits the offense of malicious intimidation or harassment when, because of another person's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities, he purposely or knowingly, with the intent to terrify, intimidate, threaten, harass, annoy, or offend:

(a) causes bodily injury to another;

(b) causes reasonable apprehension of bodily injury in another; or

(c) damages, destroys, or defaces any property of another or any public property.

(2) For purposes of this section, "deface" includes but is not limited to cross burning or the placing of any word or symbol commonly associated with racial, religious, or ethnic identity or activities on the property of another person without his or her permission.

(3) A person convicted of the offense of malicious intimidation or harassment shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed $5,000, or both.

[71]Idaho Code Sec. 18-7902. (The Michie Co. 1948-1991) It shall be unlawful for any person, maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry, or national origin, to:

(a) Cause physical injury to another person; or

(b) Damage, destroy, or deface any real or personal property of another person; or

Columbia, specifically prosecute cross burning as a hate crime or bias-motivated crime, meaning the laws single out crimes based on race, sex or religion as did the St. Paul statute struck down as unconstitutional.[74]

(c) Threaten, by word or act, to do the acts prohibited if there is reasonable cause to believe that any of the acts described in subsections (a) and (b) of this section will occur.

For purposes of this section, "deface" shall include, but not be limited to, cross-burnings or the placing of any word or symbol commonly associated with racial, religious or ethnic terrorism on the property of another person without his or her permission.

[72]N. J. Stat. Ann. 2C:33-10. (West 1991) A person is guilty of crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to a burning cross or Nazi swastika. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

[73]Wash. Rev. Code Ann. 9A.36.080. (West 1991) (1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap:

(a)Causes physical injury to another person; or

(b) By words or conduct places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person. Such words or conduct include, but are not limited to, (i) cross burning, (ii) painting, drawing, or depicting symbols or words on the property of the victim when the symbols or words historically or traditionally connote hatred or threats toward the victim, or (iii) written or oral communication designed to intimidate or harass because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap. However, it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person; or

(c) Cause physical damage to or destruction of the property of another person. ...

(3)Malicious harassment is a class C felony).

(4) In addition to the criminal penalty provided in subsection (3) of this section, there is hereby created a civil cause of action for malicious harassment. A person may be liable to the victim of malicious harassment for actual damages and punitive damages of up to ten thousand dollars. ...

[74]D.C. Code 1981 Sec. 22-3112.2. (a) It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a cross or other religious symbol on any private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, or religion, or on

General hate-crime laws similar to St. Paul's under which other states have prosecuted cross burning also have been applied to cross burning elsewhere. For instance, two Pennsylvania teenagers were charged in November of 1991 with ethnic intimidation, criminal conspiracy and harassment under that state's hate-crime law in connection with a cross burning at a black family's home.[75]

The other ten states that address cross burning do not refer to race, so their laws should withstand constitutional scrutiny. Arizona punishes cross burning as criminal trespass.[76] Florida's 1951 law extends to public cross burning.[77] California,[78] and Georgia[79]

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any public property in the District of Columbia; or to place or to display in any of these locations a sign, mark, symbol, emblem, or other physical impression including, but not limited to, a Nazi swastika or any manner of exhibit which includes a burning cross, real or simulated, with the intent:

(1)To deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States of the District of Columbia from giving or securing to all persons within the District of Columbia equal protection of the law;

(2) To injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;

(3) To intimidate, threaten, abuse, or harass any other person; or

(4) To cause another person to fear for his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability.

[75]*Legal developments*, Klanwatch Intelligence Report, February 1992, at 29. Three Illinois men were convicted of misdemeanor level ethnic intimidation in connection with a 1990 cross burning and window-smashing attack on a black family's home. They were given two years' probation and ordered to perform 100 hours of community service. Id. at 28.

[76]Ariz. Rev. Stat. Sec. 13-1504. (A) (West 1991) A person commits criminal trespass in the first degree by knowingly: ...4. Entering or remaining unlawfully on the property of another and burning, defacing, mutilating or otherwise desecrating a religious symbol or other religious property of another without the express permission of the owner of the property. (West 1991).

[77]Fla. Stat. Ann. Sec. 876.17.(West 1991) It shall be unlawful for any person or persons to place or cause to be placed in a public place in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part. (West 1991).

[78]Cal. Penal Sec. 11411 West 1991). Any person who burns of desecrates a cross or other religious symbol, knowing it to be a religious symbol, or places or displays a sign, mark, symbol, emblem, or other physical impression, including but not limited to a Nazi swastika on the private property of another without authorization for the purpose of terrorizing another or in reckless

criminalize it as terrorism. Maryland lists cross burning under arson.[80] North Carolina bans it along with other prohibited secret societies and activities.[81] Rhode Island's prohibition alludes to group libel.[82] Cross burning is a breach of the peace in South Carolina.[83]

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disregard of the risk of terrorizing another shall be punished by imprisonment in the county jail not to exceed one year or by fine not to exceed five thousand dollars ($5,000) or by both such fine and imprisonment for the first such conviction and by imprisonment in the county jail not to exceed one year or by fine not to exceed fifteen thousand dollars ($15,000) or by both such fine and imprisonment for any subsequent conviction. As used herein, "terrorize" means to cause a person of ordinary emotions and sensibilities to fear for personal safety. (West 1991).

[79]Ga. St. Code Sec. 16-11-37. (a) A person commits the offense of a terroristic threat when he threatens to commit any crime of violence or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience. No person shall be convicted under this subsection on the uncorroborated testimony of the party to whom the threat is communicated.

(b) A person commits the offense of a terroristic act when:

(1) He uses a burning or flaming cross or other burning or flaming symbol or flambeau with the intent to terrorize another or another's household;...

[80]Md. Code 1957, Art. 27, Sec. 10A. (The Michie Co. 1957-1990) It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place. Any person or persons who violates the provisions of this section shall, upon conviction, be deemed guilty of a felony and shall suffer punishment for a period not to exceed 3 years or shall be fined an amount not to exceed $5,000 or shall suffer both such fine and imprisonment in the discretion of the court.

[81]N.C. Gen. Stat. Sec. 14.12.12 (The Michie Co. 1944-1991) (a) It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

(b) It shall be unlawful for any person or persons to place or cause to be placed on the property of another is this State or on a public street or highway, a burning or flaming cross or any manner of exhibit in which a burning or flaming cross real or simulated, is a whole or a part, with the intention of intimidating any person or persons or of preventing them from doing any act which is lawful, or causing them to do any act which is unlawful.

[82]R.I. Gen. Laws 1956, Sec. 11-53-2. Any person who, with the intent of terrorizing another or group of others or in reckless disregard of terrorizing another or group of others or with the intent of threatening any injury to the person, reputation or property of another or group of others, burns or

Vermont outlaws burning any religious symbol.[84] Virginia labels cross burning a felony.[85]

Cities and states also use general penal codes to prosecute cross burning, the course the U.S. Supreme Court advised legislatures to follow. For instance, when Dubuque, Iowa, in the fall of 1991 experienced a rash of cross-burnings, it applied general penal codes to the crime.[86] In addition, cross-burning convictions twice have

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otherwise desecrates a cross or other religious symbol or who places or displays a sign, mark, symbol, emblem, or other physical impression, including but not limited to Nazi swastika on the property of another or group of others without authorization shall be punished by imprisonment in the adult correctional institution for not more than two (2) years, or by a fine of not more than five thousand dollars ($5,000), or by both the adult correctional institution for not more than ten (10) years, or by a fine of not more than fifteen thousand dollars ($15,000), or by both such fine and imprisonment for any subsequent conviction.

[83]S.C. Code 1976 Sec. 16-7-120.It shall be unlawful for any person to place or to cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part or to place or cause to be placed on the property of another in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

[84]13 Vt. Stat. Ann. Sec. 1456. Any person who intentionally and maliciously sets fire to, or burns, causes to be burned, or aids or procures the burning of a cross or a religious symbol, with the intention of terrorizing or harassing a particular person or person, shall be subject to a term of imprisonment of not more than two years or a fine of not more than $5,000.00 or both.

[85]Va. Code 1950, Sec. 18.2-423. (The Michie Co. 1949-1991) It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

[86] In February 1992, a 19-year-old man began serving a six-month sentence on a reduced charge of fourth-degree criminal mischief for burning a group of five crosses. In October of 1991, two 19-year-old convicted cross-burners in Dubuque received suspended two-year prison sentences for reduced misdemeanor charges of third-degree arson. They also were ordered to attend racial-sensitivity seminars, and one was to write about Martin Luther King Jr.'s "Letter from the Birmingham Jail." *Chronology*, Dubuque Telegraph Herald, Nov. 5, 1991, at 5A. In November of 1991, two other youths were charged with felony possession of incendiary materials in connection with another Dubuque cross burning. If convicted, the 15- and 16-year-old youths face up to 10 years in prison. Bruce Japsen, *Teens charged in cross burning*, Dubuque Herald, Nov. 20, 1991, at 1.

been upheld by state appeals courts, although neither case involved first-amendment claims.[87]

These cases and statutes show cross burnings similar to the one that occurred in the Joneses' yard have long been considered criminal conduct by state courts and legislators. They also demonstrate a variety of constitutionally viable approaches to combating cross burning available to state and municipal law enforcement officials. The federal government also treats uninvited cross burning as a crime, prosecuting it as a civil rights violation since 1974.[88]

FEDERAL APPROACHES TO CROSS BURNING

Federal courts considered cross burning and the first amendment as far back as 1966, when a California district court upheld a preliminary injunction prohibiting a "'gigantic cross burning' meeting and rally" by the Ku Klux Klan on U.S. Forest Service property.[89] The KKK, who relied on the original civil rights acts, failed to persuade the court its rights of assembly had been unconstitutionally denied. But since 1969's *Brandenburg* ruling referred to above protected the

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[87]The Court of Appeals of Kansas upheld the conviction of communicating a terroristic threat in an incident stemming from a cross burning on the lawn of an assistant county attorney. State of Kansas v. Miller, 629 P.2d. 748, 750 (C.A Kans., 1981). The Court of Appeals of South Carolina upheld the conviction of a man for aiding and conspiring to communicate a threat following a cross burning on a police chief's lawn, ruling it was unnecessary to support a conviction for the defendant to threaten the victim before burning the cross. State v. Garrett, 406 S.E.2d 910 (C.A.S.C. 1991). In the same incident, Jackie Ted Garrett was acquitted of the state's cross-burning law. Id. The Court of Appeals of Washington dismissed for lack of jurisdiction juvenile court convictions for federal civil rights violations stemming from a 1980 cross burning in a black family's yard. State v. Tidwell, 651 P.2d 228 (C.T.A. Wash. 1982). The court remanded the juvenile's conviction for criminal trespass in the second degree.

[88]*Civil rights prosecutions involving racial violence [crossburnings] (as of 3-3-92)*, Criminal Section of the Justice Department's Civil Rights Division. The criminal section was formally organized in 1971.

[89]Fowler v. U.S., 258 F.Supp 638, 640 (1966). In a later case involving burning crosses, the Fifth Circuit affirmed the conviction of three Georgia Klansmen for a "reign of terror" in 1964-65 that included shooting, beating and killing blacks as well "burning crosses at night in public view." Myers v. U.S., 377 F.2d 412, 414 (5th Cir. 1967).

Klan s right to hold cross-burning rallies, the federal government has not prosecuted such cross burnings.[90]

A review of federal cases, however, shows that the federal courts support prohibiting cross burning aimed at intimidating individuals, as occurred in *RAV*. Since 1974, the Civil Rights Division of the Justice Department has prosecuted seventy-one cases of uninvited cross-burning on private property involving 138 defendants.[91] In the past five fiscal years, sixty-two of seventy-one defendants in twenty-four federal cross-burning cases pled guilty, seven were convicted and two were acquitted.

The division's primary weapon is the civil-rights law prohibiting anyone from interfering with a person's housing rights.[92] When more than one defendant is involved, the Justice Department may charge them with conspiracy to interfere with a person's civil rights.[93] Because conspiracy is a felony, the department in these cases may add the charge of arson committed in connection with a felony.[94] Together with federal Sentencing Commission guidelines taking into account other factors such as whether the defendants target a vulnerable victim, cross burning can result in federal sentences longer than fifteen years, although most appear to be considerably shorter.[95]

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[90]395 U.S. 444, (1969), *supra* note 58.

[91]*Civil rights prosecutions involving racial violence*, Justice Department. Prosecutions more than tripled from 10 defendants in 1990 to 32 defendants in fiscal year 1991. Id.

[92]42 U.S.C. Sec. 3631 (b). The sentence is up to a year in prison or $1,000 or more if bodily injury results.

[93]18 U.S.C. Sec. 241. The sentence may be as high as a $5,000 and 10 years in prison.

[94]18 U.S.C. Sec. 844 (h)(1). The sentence is a mandatory five years.

[95]Interview with Lorna Grenadier, chief paralegal, Civil Rights Division, FBI, Washington, D.C., (Feb. 28, 1992). The Justice Department through its regional Federal Bureau of Investigation offices monitors cross burnings nationwide, prosecuting if it believes local authorities have failed to protect the victims' civil rights. Id. Among recent cases was an incident where five men pled guilty to interfering with the housing rights of an interracial couple at whose home they burned a cross while screaming racial epithets at them; in another case, fourteen KKK members pled guilty on conspiracy charges in a series of cross burnings following the sentencing of a Klan leader on a federal firearms offense.*Civil rights prosecutions*, FBI.

Federal appeals courts have upheld the handful of contested convictions of cross burners, including Bruce Roy Lee's first-amendment challenge discussed above.[96] As an example of the cases affirmed by federal courts, the Sixth Circuit upheld lengthening under the federal Sentencing Commission's "vulnerable victim" standard the prison sentence of a Michigan man convicted of conspiracy to violate the civil rights of an elderly black couple on whose lawn he and an accomplice ignited a cross. The court found that a "black American would be particularly susceptible to the threat of cross burning because of the historical connotations of violence associated with the activity."[97]

The question remains whether the federal law prohibiting use of arson to commit a felony applies to cross burners. The 11th Circuit upheld the use of a federal sentencing guideline governing the use of fire to commit a federal felony to lengthen the sentence of two cross burners.[98] However, the Eighth Circuit in 1991 reversed a cross burner's conviction of use of fire in a felony on the grounds the statute was unintended for such situations.[99] In contrast, a federal

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[96]*Supra* note 63.

[97]The standard allows judges to increase prison sentences if a crime targets a vulnerable victim. The defendant was sentenced to 24 months in federal prison, although the district court dropped charges of violating the couple's housing rights and using fire to commit a felony. U.S. v. Salyer, 893 F.2d 113, 116 (5th Circ. 1989). The Ninth Circuit also affirmed on vulnerable-victim grounds enhancing the 37-month sentence of a "skinhead" convicted of conspiracy, intimidation and using fire to commit a felony in connection with a cross burning on the lawn of a neighboring family. "Seven months after the incident, the family still lived in fear. Mr. Heisser still awakened at night to investigate any noises. Mrs. Heisser was prescribed medication to deal with the incident and ... is afraid when she stays home alone." U.S. v. Skillman, 922 F.2d 1370, 1378 (9th Cir. 1991). In July of 1991, the 11th Circuit also affirmed enhanced sentences for three convicted cross burners on vulnerable-victim grounds. The trio burned a cross at midnight in the yard of the first black family to move to a rural Florida area. U.S. v. Long, 935 F.2d 1207 (1991).

[98]U.S. v. Worthy, 915 F.2d 1514 (11th Cir. 1990). The Sixth Circuit agreed the same sentencing guideline for arson applied to cross burning when it affirmed the convictions and remanded the sentencing of two men convicted of burning a cross in a vacant lot in a black neighborhood. The judge said the cross burners "chose an age-old symbol of racism." U.S. v. Gresser, 935 F.2d 96, 101 (6th Cir. 1991).

[99]U. S. v. Lee, 935 F.2d 952, 953 (8th Cir. 1991). Bruce Roy Lee burned a cross adjacent to an apartment complex in which about a quarter of the residents were black. Lee also was placed on supervised release for three years to follow imprisonment and ordered to pay a special assessment of $100.

district court that year ruled the same statute does apply to cross-burning.[100]

These cases show that the federal courts for years have supported prohibiting cross burning aimed at intimidating individuals. The exception appears to be ceremonial cross burnings conducted with the property owner's permission as in *Brandenburg*, although no similar cases have arisen in federal courts since that 1969 decision.[101] Despite federal and state prosecutions, cross burning is on the rise along with other hate crimes. Klanwatch reported seventy-four cross burnings nationwide in 1991, up from fifty in 1990,[102] along with twenty-five hate-motivated murders[103] and a 27 percent increase in hate groups from 273 in 1990 to 346 in 1991.[104] The FBI agrees racism, bias, bigotry and related violence are escalating.[105] In response, forty-six states carry some sort of hate-crime laws on their books now invalidated by the *RAV* ruling.[106] The federal government passed the Hate Crimes Statistics Act, which went into effect Jan. 1, 1991.[107] The next section discusses concerns about free expression raised by hate-crime laws.

THE EVOLUTION OF HATE-CRIME LAWS

A hate crime has been defined as an offense that is committed because of a victim's race, color, religion, ancestry, national origin,

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[100]U.S. v. Hayward, 764 F.Supp. 1305 (1991).

[101]See *supra* note 59 on a similar California cross-burning case.

[102]*Cross burnings*, Klanwatch Intelligence Report, February 1992, at 22.

[103]*Deadly hatred on American streets*, Klanwatch, February 1992, at 19. Klanwatch claims that figure is low. Two thirds of the murders involved race, seven victims were gay and one was Jewish. Forty-one of the 51 defendants were teenagers. Id.

[104]*Record number of hate groups active across U.S. in 1991*, Klanwatch, February, 1992, at 1.

[105]Uniform Crime Reports 1990: Crime in the United States, U.S. Department of Justice, Federal Bureau of Investigation, 17, (1990). Administered by the FBI's Uniform Crime Reports, the first year's data may be released in the fall of 1992, according to a spokesman.

[106]Rorie Sherman, *Hate crimes statutes abound*, National Law Journal 12, May 21, 1990, p. 3. The four states with no hate crime laws are Arkansas, Nebraska, Utah and Wyoming. Id.

[107]*Hate crimes bill passed*, Klanwatch, April 1990, at 1.

political affiliation, sex, sexual orientation, age or disability.[108] Virtually all state hate-crime (or bias-motivated) laws address racial, ethnic and religious intimidation. About a half dozen also address sexual orientation; Vermont includes age. All of the states prescribe stiffer sentences for persons convicted of violating general penal codes if the crime is found to be bias-motivated. Some are tougher on crimes against institutions; others target as more serious harassment against individuals.[109] Before *RAV*, lower courts occasionally have ruled hate-crime laws unconstitutional.[110] The popular press has been unremittingly hostile to hate crime laws. The National Review derided as "silly" the Hate Crimes Statistics Act.[111] Village Voice columnist Nat Hentoff criticized laws like St. Paul's as "feel-good 'civil libertarianism,' since it's guaranteed to make your friends congratulate you for caring more about combating prejudice than for sticking to First Amendment 'technicalities'." [112] In contrast to the news media, legal commentators generally have supported hate-crime legislation. Most of the dozens of law-journal articles about hate-speech codes on college campuses, for instance, support codes protecting individuals targeted for harassment, although they deplore overbroad speech codes worded similarly to the St. Paul statute.[113] The federal Hate Crime Statistics Act was applauded by a

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[108]Bill Hafferty, *Prosecuting bigotry*, 11 California Lawyer 28, June 1991. Bias crimes can be difficult to separate from simple assault. "If they shout an epithet, then punch you that's hate crime. If they punch you first and follow with the epithet - it's not," says the head of Santa Clara County's (Calif.) district attorney's hate crimes unit. Id.

[109]Alaska, Arizona, Kansas, Maine and Texas are tougher on institutional crime; Michigan, New York, South Dakota and North Carolina are tougher on harassment. Id. at 28.

[110]In Columbus, Ohio, a common pleas judge dismissed a racial assault case brought under the state's 1986 Ethnic Intimidation Act on the grounds the act was unconstitutionally vague. A Michigan county judge refused to charge a man with ethnic intimidation in addition to other charges stemming from his destruction of a black family's home on the grounds the law was unconstitutionally vague. Klanwatch, February 1991, at 12.

[111]*The meaning of 'hate'*, National Review 42, April 30, 1990, at. 17.

[112]Nat Hentoff, *Would you fight for the Klan's First Amendment rights?* Village Voice 35, Oct. 9, 1991, at 18.

[113]Fourteen of 22 recent law-review articles analyzed supported narrowly worded harassment codes. Linda Lumsden, *Sticks and Stones: Why first amendment absolutism fails when applied to campus harassment codes*, paper

legal commentator who said it will force an official acknowledgment and response to hate-crime incidents.[114] "Until recently," wrote a columnist in California Lawyer, "the criminal justice system often regarded hate-motivated violence as petty vandalism, or, worse yet, understandable behavior against a disliked group. Judges may tend not to treat hate crimes as seriously, yet experience shows these victims are traumatized more than you would imagine."[115] Another scholar wrote, "Crimes of violence motivated by hatred of minorities have become a real menace to society in the past few years. ... A well-drafted statute would have a positive effect in that it would define certain acts of violence and intimidation against minorities as crimes."[116] A black lawyer criticized a ruling that Michigan's ethnic intimidation law is unconstitutionally vague and overbroad: "The extent to which the state may regulate speech and expression is dependent upon showing that substantial privacy interests of others are being invaded in an essentially intolerable manner. In the ethnic intimidation statute, [Michigan] has a substantial interest in protecting its citizens from unwanted intrusions."[117] Supporters of hate-crime laws say such crimes deserve to be treated separately. "Bias crimes merit special attention because of their effect on an entire group of people. The entire class of persons represented by the individual recipient of the violation is likely to feel victimized," writes one scholar.

But prosecuting hate crime gets constitutionally complicated when it involves symbolic speech. One scholar fears the intolerant impulse against "ugly speech" may have counter-productive long-term results, since it forbids expression of societal fears and

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presented to the Law Division, 1992 AEJMC Convention, Aug. 8, 1992, Montreal, Canada.

[114] J. Fernandez, *Bringing hate crime into focus - the Hate Crime Statistics Act of 1990, Pub. L. No. 101-275*, 26 Harv. C.R.-C.L. L. Rev. 261 (1991).

[115] Hafferty, *supra* note 108.

[116] Bruce Pitts, *Eliminating hate: a proposal for a comprehensive bias crime law*, 14 Law & Psych. Rev. 139, 150-151 (1990).

[117] Clinton Canady III, *Ethnic Intimidation*, 70 Mich. Bar J. 536, 538-539 (June 1991). Under the felony, a person could be found guilty of ethnic intimidation if they "maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin..." MCLA 750.147(b).

prejudices. "[I]t enables the society to tell itself (smugly and falsely) that *it* has no problem; the problem lies within those horrid offenders whom we have righteously muzzled."[118]

Although a literature review uncovered no law-journal articles specifically about cross burning, the act is mentioned by scholars writing about symbolic expression. Some scholars deny even public cross burning deserves protection as symbolic expression. "The swastika, the Klan robes, the burning cross are examples of signs - like all signs - that have no meaning on their own, but that convey a powerful message to both the user and the recipient of the sign in context," writes Professor Mari J. Matsuda, the foremost advocate of "outsider jurisprudence" who would punish some racist speech.[119] She argues victims of such messages suffer psychological and spiritual harm that inhibits them from exercising their own free speech rights. Law Professor Charles Lawrence agrees racist expression does not belong in the marketplace of ideas:

> When the Klan burns a cross on the lawn of a black person who joined the NAACP or exercised his right to move to a formerly all-white neighborhood, the effect of this speech does not result from the persuasive power of an idea operating freely in the market. It is a threat, a threat made in the context of a history of lynchings, beatings, and economic reprisals that made good on earlier threats, a threat that silences a potential speaker.[120]

Free speech concerns were reiterated by commentators writing in anticipation of the *RAV* decision. "It is not legitimate to limit expression solely because it arouses 'anger, alarm, or resentment in others,' as the St. Paul ordinance does," said The New Republic. It

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[118]C. R. Massey, *Pure symbols and the First Amendment*, 17 Hastings Const. Law Qu. 369, 375 (Winter 1990). Emphasis in original.

[119]Mari J.Matsuda, *Public response to racist speech: considering the victim's story*, 87 Mich. L. R. 2730, 2765-2766 (1989). Matsuda defines outsider jurisprudence as a methodology of people of color and white women that recognizes law is basically political.

[120]Charles Lawrence, *If he hollers let him go: regulating racist speech on campus*, 1990 Duke L.Rev. 431, 471-472.

invoked the marketplace of ideas metaphor: "The remedy to be applied is more speech, not enforced silence."[121] The magazine advocated prosecuting hate crimes as harassment, trespassing and disturbing the peace. In a later issue, a gay, Jewish columnist said, "I want unequivocal, no-'buts' protection from violence and vandalism. ... I do not want policemen and judges inspecting opinions."[122] Constitutional scholar Laurence Tribe said the *RAV* ruling is crucial because so many groups today - college administrators, feminists, minorities - argue some speech is so harmful it should be suppressed. "The First Amendment is almost always tested with speech that is profoundly divisive or painful," Tribe told The New York Times. "But if you start making exceptions, and suppressing speech that is hurtful, those exceptions will swallow free speech, and the only speech that will be left protected will be abstracted, emotionally lightweight speech that doesn't pack any wallop."[123] A writer in the Harvard Journal of Law and Public Policy anticipated Justice Scalia's reasoning in *RAV* in an article that argued St. Paul's content-based statute is unconstitutional.[124]

This literature review demonstrates the depth of the feelings on both sides of the hate-speech debate embodied in the *RAV* case. Because of the high value Americans place on the conflicting interests at stake, free speech versus equal protection, the ruling probably will stand as one of the Supreme Court's most far-reaching interpretations of the first amendment.

RAV V. ST. PAUL AND ITS RAMIFICATIONS

The *RAV* cross-burning occurred on June 21, 1990, when six young men gathered to drink alcohol and smoke marijuana at Arthur Miller's home across the street from the Joneses' house. Taping together two-foot-long dowels from a chair and wrapping them in terrycloth, the youths fashioned a cross to which they attached a

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[121] *Breaking the codes*, The New Republic 205, July 8, 1991, at. 7-8.

[122] Jonathan Rauch, *Thought crimes*, The New Republic 205, Oct. 7, 1991) at 17 and 18-19.

[123] Lewin, *Hate crime law is focus*," N. Y. Times, Dec. 1, 1991, at 15.

[124] Erent A. Young, *Regulation of racist speech: In re Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991)*, 14 Harv. J. of Law and Pub. Pol. 303 (1991).

propane tank and shellac thinner before carrying it over the Joneses' fence, dousing it with paint thinner and setting it afire. Then they ran back across the street to make another cross. Meanwhile, the Joneses called the police. The couple and their five children aged 6 months to 9 years had suffered other vandalism and name-calling in the six months since they'd moved to the white working-class neighborhood to escape inner-city violence. After the police left, the youths lit the second cross across the street from the Joneses' home and drove to an apartment complex to light a third cross.[125]

A Ramsey County juvenile court judge agreed with Viktora's lawyer that the St. Paul ordinance was unconstitutionally broad.[126] In reversing, the Supreme Court of Minnesota said the burning cross is "an unmistakable symbol of violence and hatred" and "deplorable conduct."[127] The court concluded that although the St. Paul ordinance should have been more carefully drafted, it could be interpreted to reach only "fighting words" found unprotected by the first amendment in *Chaplinsky v. New Hampshire*[128] and words inciting to imminent lawless action as established in *Brandenburg*.[129] Under those two narrowing constructions, the Minnesota court ruled the statute constitutional.

In the U.S. Supreme Court's reversal, Justice Scalia, joined by Chief Justice William Rehnquist and Justices Anthony Kennedy, David Souter and Clarence Thomas, said the ordinance's constitutional flaw was its content-based discrimination, since it criminalized only those fighting words addressed to a listener's race, sex or religion. Hailed by *The New York Times* as a decision of "landmark dimension,"[130] this ruling opens the door to radical new interpretations of the first amendment, since fighting words[131] previously have been treated as

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[125]Respondent's Brief at 3-4, RAV v. St. Paul, (No. 90-7675), ---U.S.--- (1992).

[126]Lewin, *Hate crime focus*, N.Y. Times, Dec. 1, 1991, at 15.

[127]In the Matter of the Welfare of R.A.V., 464 N.W.2d 507, 508 (Minn. 1991).

[128]315 U.S. 568 (1942). Defining fighting words as "those by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 572.

[129]*Supra* note 58.

[130]Linda Greenhouse, *2 visions of free speech*, The New York Times, June 24, 1992, at A1.

[131] "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any

outside the realm of the first amendment. According to the majority, such expression is not "entirely invisible to the Constitution": Only the "mode" in which fighting words are expressed is unprotected; their message is protected no matter how hateful.[132] Thus, the idea of racial animosity conveyed by uninvited cross burning on private property is protected even though the act may be illegal.

While in some ways it is reassuring that the conservative Court came out resoundingly on the side of free speech in *RAV v. St. Paul*, the ruling's ramifications may create more speech problems in the long run. And what *The New York Times* described as the ruling's "tone of arid absolutism" has sent a message to many of America's minority citizens that for them, the price of free speech has become too high.[133]

It is unfortunate the majority welcomed the intimidation inherent in cross burning into the marketplace of ideas. The majority's evaluation is antithetical to the history of judicial treatment of uninvited cross burning.[134] While the majority claimed that St. Paul conceded cross burning contains a message, the Court failed to mention that the city's point was the message is devoid of constitutionally protected expression: "It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victims [sic] head."[135] "Secret cross burners and public flag burners are similar only in the unpopularity of the position that they take," St. Paul correctly argued. "The first amendment does protect the unpopular. It does not, however, protect acts, the only expressive content of which is to threaten others."[136] Justice Stevens agreed: "The cross-burning in this case--directed as it was to a single

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Constitutional problem. ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942).

[132]1992 WL 135564, *4, 9 (U.S.).

[133]Greenhouse, *2 visions*, N. Y. Times, June 24, 1992, at A11.

[134]See *supra* notes 55-57 and accompanying text.

[135]Respondent's Brief at p. C-6, RAV, (No. 90-7675).

[136]Respondent's Brief at 23, 25 (No. 90-7675).

African-American family trapped in their home--was nothing more than a crude form of physical intimidation."[137]

The ruling means legislatures cannot proscribe only those fighting words--until *RAV* treated as unprotected--addressing only race, sex or religion because that is viewpoint discrimination. "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas," Scalia wrote, noting the law does not prohibit fighting words that target political affiliation or homosexuality. "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[138] He said exceptions can be made in some instances as long as no possibility exists that "official suppression of ideas is afoot."[139] Cross-burner Viktora should have been prosecuted under any of several state laws such as making a terroristic threat, criminal damage to property and trespassing. "St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire," Scalia wrote.

The four other justices--Justices Byron R. White, Harry A. Blackmun, Jon Paul Stevens and Sandra Day O'Connor--found the law unconstitutional on existing overbreadth grounds by criminalizing in addition to fighting words expression that causes only hurt feelings.[140] But Justice White's concurrence, joined by the Stevens, O'Connor and Blackmun, took exception to the new fighting-words interpretation. "Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury," White said. His concurrence maintained legislatures can choose to ban certain categories of speech that otherwise are undeserving of protection. The majority's "insistence on inventing its brand of First Amendment

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[137]1992 WL 135564 *28, (U.S.).

[138]1992 WL 135564, *6 (U.S.).

[139]Id.

[140]In addition to White's concurrence, joined by the three other justices except Stevens in Part 1, Blackmun wrote a separate opinion as did Stevens, joined by Blackmun and White. WL 135564, *2 (U.S.).

underinclusiveness ...,"[141] Justice White warned, "legitimates hate speech as a form of public discussion."[142]

One far-reaching aspect of the ruling is that the majority refused to buy the argument racist speech causes more harm than other speech. "This is word-play," Scalia wrote.[143] The ruling delivers a knockout punch to legal critics who have argued for the need to restrict hate speech. It quashes hate-crime laws, sentence enhancement for persons convicted of bias-motivated crime and college campus hate-speech codes.

The majority's refusal to concede hate crimes' may cause special harm also angered the concurring justices. "I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns," Justice Blackmun said, "but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community."[144] Justice Stevens said the majority ignored reality. "One need look no further than the recent social unrest in the Nation's cities to see that race-based threats may cause more harm to society and to individuals than other threats."[145]

Scalia's majority opinion ignored arguments by the city and numerous amicus curiae briefs describing the harm imposed by hate speech. They stressed the invidiousness of cross burning in particular and its negative effect on individuals and the community. For instance, an amicus curiae brief joining seventeen states supported the St. Paul ordinance as a valid way for government to quell the "virulent national epidemic" of bias-motivated crime.[146] The states

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[141]1992 WL 135564, *11 (U.S.).

[142]Id. at 12.

[143]Id. at 7, (U.S.).

[144]Id. at 19. Justice White also agreed with "the City's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable. ... [T]he interest is compelling." Id. at 14.

[145]Id. at 6.

[146]Amicus curiae brief at 9, RAV, (No. 90-7675). The states include Alabama, Arizona, Connecticut, Idaho, Illinois, Kansas, Maryland, Massachusetts,

contended other laws inadequately address hate crime. "The burning of a cross on the property of an African-American family is most emphatically not the equivalent of a simple trespass and minor arson, either to the specific victims of the crime or to the community in which it occurs," the brief said.[147] [148] The Court ruling goes even further than most of *RAV*'s supporters had urged.[149]

The Court displayed such aversion toward hate-crime laws it prompted Justice Blackmun to label the majority opinion a misplaced stab at political correctness.[150] Legal experts also interpreted the

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Michigan, Minnesota, New Jersey, Ohio, Oklahoma, South Carolina, Tennessee, Virginia and Utah.

[147]In another brief, the Criminal Justice Legal Foundation agreed other criminal laws inadequately address the special harms posed by hate crime. "The physical damage may be the same as if R.A.V. had built a campfire and toasted marshmallows, but the psychological harm to victims is far greater." Amicus Curiae Brief at 10. The National Black Women's Health Project focused on cross-burning as a "terrorist hate practice of intimidation and harassment." Amicus Curiae Brief at 4. For the Anti-Defamation League of B'nai B'rith, cross-burning's symbolism augmented rather than obscured its criminal violation of civil rights: "It was a red-hot and searing action, pregnant with meaning to the victims." Amicus Curiae Brief at 12. The NAACP said the attack on the Joneses differed from public cross burnings. "A cross burning executed in this manner is not the exposition of an idea, but a wanton and volatile act intended to terrorize an innocent family." Amicus Curiae Brief at 6.

[148]Amicus Curiae Brief at 41, (No. 90-7675). "It is a manifest distortion of reality to claim there is an undifferentiated slippery slope leading from the midnight cross burning trespasser, to the speaker on communism or lesbian rights who offends and angers those who oppose their views." Id. A final amicus curiae brief taking issue with the petitioner's slippery-slope argument that laws like St. Paul's endanger minority groups' free-speech rights united thirteen organizations representing black lawyers, black law-enforcement officers, black homosexuals, the Young Women's Christian Association of the U.S.A., the United Auto Workers of America and the Center for Democratic Renewal. Amicus Curiae Brief at 41.

[149] An amicus curiae brief filed by the American Civil Liberties Union, Minnesota Civil Liberties Union, American Jewish Congress and Patriot's Defense Foundation, Inc. suggested only that the statute be thrown out on overbreadth grounds. It criticized St. Paul's ordinance as "hopelessly flawed" and "incurably vague" with "significant potential for arbitrary enforcement." Amicus Curiae Brief at 5, (No. 90-7675). The Center for Individual Rights' brief for *RAV* opposed a content-based law, while a brief by the Association of American Publishers and Freedom to Read Foundation charged the Minnesota Supreme Court misread the overbreadth doctrine. (N. 90-7675)

[150]1992 WL 135564, *19 (U.S.). Blackmun said, "the court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity,' neither of which is presented here." Id.

decision as a reaction to fear of liberal orthodoxy. "This decision was clearly written in the larger political context in which the conservative wing of the court is concerned about the political correctness movement," said Steven Shapiro, a lawyer for the American Civil Liberties Union.[151] News commentators approved. *The Washington Post* said, "The ruling is sweeping and reassuring ...".[152]

The media's relief contrasted with the consternation which the ruling aroused among the St. Paul law's supporters--including seventeen states and the National Association for the Advancement of Colored People. They were dismayed the Court lifted uninvited cross burning on private property into the marketplace of ideas while burying a legal tool for fighting hate crime. "While the justices may think they struck a blow for free speech," wrote a black columnist, "they have proven themselves no better than the court that found against Dred Scott in 1857, the court that wrote the infamous words, 'Blacks have no rights that whites are bound to respect.'"[153]

The majority seemed to note only as an afterthought that "burning a cross in someone's front yard is reprehensible."[154] The words came in a final short paragraph following an asterisk at the end of Scalia's opinion. In reading the rest of his opinion, one would think Robert Viktora had simply delivered a speech discussing whites' superior racial attributes. Even *The New York Times* remarked on the majority's "bland insistence on the moral equivalency of speech."[155] The tone contrasts markedly with the Seventh Circuit's 1978 opinion permitting Nazis to demonstrate in the Jewish suburb of Skokie, Ill., which went to great lengths to

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[151]William H. Freivogel, *What Scalia didn't say*, The Herald-Sun (Durham, N.C.), June 28, 1992, at G1, G2. "What you are seeing today is a conservative backlash to political correctness," said Rodney Smolla, head of the Institute of Bill of Rights Law at the College of William & Mary. Tony Mauro, *Free speech is now conservatives' cause*, USA Today, June 23, 1992, at 8A.

[152]*Hate crimes and free speech*, The Washington Post, June 23, 1992, at A20.

[153]Julianne Malveaux, *Don't condone hate crimes*, USA Today, June 23, 1992, at 10A.

[154]1992 WL 135564, *9 (U.S.)

[155]Greenhouse, *2 visions*, N.Y. Times, June 24, 1992, at A11.

condemn racism.[156] And the concurring justices found ridiculous the theoretical lengths to which the majority stretched to justify the *RAV* ruling. For instance, Justice Stevens' derided the majority's handwringing over hypothetical antigovernment obscenity laws as "an adventure in doctrinal wonderland."[157]

Hailed in many quarters as a free speech victory, even the four concurring justices suggested the ruling is a Trojan horse that ultimately will result in greater speech restrictions. It may open the door to proscribing more symbolic expression. The majority opinion makes it easier for lawmakers to isolate conduct from expression; that will help justify future bans on symbolic expression among those subjects it disfavors. The Court last year banned protected expression by isolating nudity as conduct in an Indiana go-go dancing case.[158] Interestingly, in that case, the Court declined to address the broader question of whether its ban on nude barroom dancers applied to all artistic expression, in contrast to its decision in *RAV* to make a sweeping first-amendment ruling that goes far beyond the question presented by the St. Paul statute. This indicates the Court felt a compelling need to quash laws based on race or other suspect classes. As Justice White pointed out, the majority easily could have thrown out the St. Paul state on existing overbreadth doctrine.

The *RAV* ruling paradoxically also makes the *O'Brien* test, which the St. Paul statute failed, a greater barrier to free expression: The majority found the statute not narrowly tailored because a statute applying to all forms of expression would have addressed hate crime as well as one limited to race and other categories.[159] Legislatures had limited their restrictions to such categories to keep them narrowly tailored; now they must draft broader restrictions upon

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[156]Collin v. Smith, 578 F.2d 1197 (1978). "Indeed, it is a source of extreme regret that after several thousand years of attempting to strengthen the often thin coating of civilization with which humankind has attempted to hide brutal animal-like instincts, there would still be those who would resort to hatred and vilification of fellow human beings because of their racial background or their religious beliefs..."

[157]1992 WL 135564, *20 (U.S.).

[158]Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456, ---U.S.--- (1991).

[159]1992 WL 135564, *2 (U.S.) See *supra* note 61 and accompanying for a description of the four-part test.

speech to avoid the new pitfall of underinclusiveness. Justice Blackmun worried the decision would relax the level of strict scrutiny applicable to content-based laws.[160]

The ruling left legislators, civil rights activists and constitutional experts debating its consequences. First-amendment expert Ronald Smolla said the ruling invalidates virtually all hate-crime laws and hate-speech codes. "The court went out of its way to enact a barrier against content-based regulation of speech that has broad implications for all of First Amendment law and goes well the immediate problem before it."[161] Hopefully the *RAV* ruling will not discourage legislators from fighting hate crime but rather encourage them to revise their hate-crime laws to comply with the new constitutional requirements. St. Paul immediately announced its plans to do so. "We do not want to be known ... as a city that tolerates actions of hate against people," said Mayor Jim Scheibel.[162] In the meantime, St. Paul announced it will drop the remaining fourth-degree assault charges against cross-burner Viktora.[163]

The twenty-two states whose hate-crime laws prohibit general intimidation or harassment, making it a crime to injure or harass a person because of race, religion or ethnic background or other categories must drop those categories so their laws apply to everyone to comply with the *RAV* ruling. Although some officials voiced confidence about systems requiring harsher sentences for general crimes proven motivated by bias, it appears they will have to abandon that approach.[164] To enhance hate-crime sentences, courts must examine a convicted person's expression to determine if his crimes was bias-motivated--exactly the official action opposed so vociferously by the majority. Colleges began reviewing and revising

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[160]Id. at 19.

[161]Ruth Marcus, *Supreme Court overturns law barring hate crimes*, The Washington Post, June 23, 1992, at A1.

[162]Mary R. Sandok, *Victim says laws are needed*, The Philadelphia Inquirer, June 23, 1992, at A13.

[163]Id.

[164]Paul M. Barrett, *Justices reject broad 'hate crime' law as violation of free-speech guarantee*, Wall Street Journal, June 25, 1992, at A22; Kevin Sullivan, *Area jurisdictions call hate-crime laws solid*, The Washington Post, June 23, 1992, at A6.

their policies to ensure their constitutionality; some administrators predicted a second Supreme Court ruling will be necessary to make clear what kinds of college codes are permissible.[165] *RAV* probably dooms the feminist legal theory movement to ban pornography on the grounds in violates women's civil rights.[166] Civil-rights activists said the invalidation of hate-crime law is a setback for civil rights despite its exhortations about free speech. "It will take some effort and creativity on the part of people in the enforcement end of government to make up for whatever is lost through this Supreme Court decision," said Daniel Addison, a lawyer and assistant director of North Carolina's Human Relations Commission.[167]

However, as this paper has attempted to demonstrate, numerous ways exist to punish uninvited cross burning on private property in a content-neutral manner. If law officials aggressively enforce them, those laws can serve as powerful deterrents to cross burning. Compre the 30-day sentence Viktora's accomplice received after pleading guilty to the now-unconstitutional St. Paul statute with the 10-year sentence a 17-year-old Iowa youth received after he was convicted of second-degree arson in connection with a similar cross burning.[168] Certainly those state laws directed solely at the act of cross burning can withstand constitutional scrutiny, such as Maryland's law that bans cross burning on public or private property without the

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[165]William Celis 3d, *Universities reconsidering bans on hate speech*, The New York Times, June 27, 1992, at A11. The University of Michigan in Ann Arbor, for instance, whose first code was ruled unconstitutional in 1989, had amended it to prohibit "physical acts or threats or verbal slurs, invectives or epithets, referring to an individual's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as part of a discussion or exchange of an idea, ideology or philosophy." Officials said they were considering a new code that simply said the university would not tolerate violence and intimidation directed at anyone.

[166]William H. Freivogel, *What Scalia didn't say*, The Herald-Sun (Durham, N.C.), June 28, 1992, at G1, G2. "This decision was clearly written in the larger political context in which the conservative wing of the court is concerned about the political correctness movement," said Steven Shapiro, a lawyer for the American Civil Liberties Union, which opposed the St. Paul ordinance. Id.

[167]Ben Stocking, *Drawing lines on hate*, The News & Observer (Raleigh, N.C.), June 23, 1992, at 1A.

Randy Rodgers, *10 years for youth in cross-burning case*, Dubuque Telegraph Herald, March 29, 1990, at 3A. The youth served nine months. Tom Bagsarian, *Simpson turns self in*, Dubuque Telegraph Herald, Feb. 3, 1992, at 1, 2A.[168]

permission of the owner and the fire department.[169] Directed at conduct and not expression, such laws should be able to pass the *O'Brien* test. General statutes such as arson, trespassing or threatening suggested by the majority also can be wielded as effective deterrents, as in the Iowa case. But laws such as Montana's that attempt to determine whether cross burning is directed at one's race or religion inevitably will fall; those states' legislatures must rewrite them to eliminate categories.[170] And state laws prohibiting cross burning in public probably were unconstitutional even before *RAV* in light of the *Brandenburg* ruling.[171] Federal prosecutorial approaches appear unaffected since they address the civil rights of all citizens. However, the *RAV* ruling may jeopardize the vulnerable-victim standard which permits longer sentences for persons convicted of burning crosses targeted at black families, since the Court appears to be adamantly adverse to affording any groups special protection.[172]

As the battle over *RAV v. St.* Paul shows, the fiery cross remains as potent a symbol today as when it was wielded by the Scottish Highlands chieftains centuries ago. This analysis shows that in spite of the majority's ruling that its hateful message is protected by the first amendment, no citizens need tolerate a burning cross in their backyard.

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[169]See *supra* note 80. The law "is clearly directed largely at prevention of trespass and damage to property," a state assistant attorney general wrote in 1991. Sullivan, *Area jurisdictions*, W. Post, at A6.

[170]See *supra* note 70.

[171]See *supra* note 58.

[172]See *supra* note 97 and accompanying text.

The Impact of *Leathers v. Medlock*:

An Analysis of the Law of Media Taxation

by

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As government budget deficits have mushroomed, state and local governments have scouted for new revenue sources. Some of those governments have decided that taxing the media is one way to balance their budgets.[1] As a result, taxation of the media has become increasingly common in the last 10 years. Some of these taxes appear to conflict with two centuries of history and law supporting an important principle: Economic regulation of the media — except for those regulations that apply to all businesses — represents unacceptable threats to First Amendment freedoms because it can too easily be used by the government to punish the media for their content.[2]

At the same time that media taxes are becoming more common, the U.S. Supreme Court has ruled that states can impose generally applicable taxes on some media and exempt others without infringing upon the First Amendment rights of the media that are taxed. That decision, in the case of *Leathers v. Medlock* (1991),[3] appears to represent a significant change in the law governing taxation of the media.[4] *Leathers* appears to contradict the

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[1] At least 10 states now impose sales taxes on the print media, and newspaper sales tax proposals were defeated in another seven states in 1991. Patrick M. Reilly & Pauline Yoshihashi, *More State Lawmakers Decide All the News Is Fit to Tax*, Wall St. J., July 23, 1991, §B, at 1. *See also State Taxes Target Papers*, presstime, Oct. 1991, at 32; Anna America, *Spread of Tax Efforts Feared*, presstime, Aug. 1991, at 34.

[2] Taxation of the press in this country dates back to the colonial period. Known as "taxes on knowledge," taxes on the press were levied in the American colonies in the form of the Stamp Act. Resistance to the act helped to precipitate the American Revolution.

[3] Leathers v. Medlock, 111 S.Ct. 1438, 18 Media L. Rep. (BNA) 1953 (1991).

Court's 1983 *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue* decision, which said states could neither single out the media for taxation nor discriminate among the media by imposing taxes.[5]

In *Leathers* the Court ruled 7-2 that Arkansas' generally applicable sales tax, which exempted all media except cable and satellite television services, did not violate the First Amendment. A cable subscriber, a cable company and a cable trade association challenged the tax law on the grounds that the First Amendment forbade taxation of some media and not others. However, Justice Sandra Day O'Connor, writing for the majority, said the First Amendment does not prevent a state from taxing some media while exempting others so long as these conditions are met:

1) The tax must be structured in a way that does not interfere with the First Amendment activities of the media or raise suspicions that it was intended to do so.

2) The tax may not select a small group of speakers to bear the burden of the tax.[6]

3) The tax cannot be content based.

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[4] *See, e.g., Tax on Cable, Not Other Media, Constitutional*, The News Media & The Law, Summer 1991, at 20.

[5] Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

[6] The Court did not explain how large the taxed group must be. As Justice Thurgood Marshall observed in dissent, "[T]he majority's approach provides no meaningful guidance on the intermedia scope of the nondiscrimination principle. From the majority's discussion, we can infer that three is a sufficiently 'small' number of affected actors to trigger First Amendment problems and that one hundred is too 'large' to do so. But the majority fails to pinpoint the magic number *between* three and one hundred actors above which discriminatory taxation can be accomplished with impunity." Leathers v. Medlock, 111 S.Ct. at 1451.

The Court held that the Arkansas tax presented none of these problems and thus did not violate the First Amendment. The Court remanded the equal protection question also raised by the cable interests.

O'Connor did not present *Leathers* as a change in the Court's position on media taxation. In fact, she cited *Minneapolis Star* as a precedent for the three rules listed above. However, she distinguished the cases based on the facts of the tax schemes being challenged and thus explained the cases' different results. For example, she said that the Arkansas tax passed constitutional muster because it did not target a narrow group to bear the burden of the tax, whereas the Minnesota tax did. The Arkansas tax targeted 100 cable companies. The Minnesota tax targeted only about a dozen newspapers.

However, Justice Thurgood Marshall, joined by Harry Blackmun, dissented because, he said, "[T]he majority has unwisely cut back on the principles that inform our selective-taxation precedents." Quoting from *Minneapolis Star*, Marshall said,

> Our decisions on selective taxation establish a nondiscrimination principle for like-situated members of the press. Under this principle, "differential treatment, unless justified by some special characteristic of the press, . . . is presumptively unconstitutional," and must be struck down "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."[7]

This paper will analyze both the *Leathers* decision and prior case law on media taxation to determine whether *Leathers* has, in fact, changed the

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[7] Leathers v. Medlock, 111 S.Ct. at 1448, quoting Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. at 585.

law significantly, and if so, how. Then this paper will discuss the implications of *Leathers* for future judicial decision making in this area. First, however, this paper will review the reaction to *Leathers* as reported in the trade and popular press.

LITERATURE REVIEW

Thus far published reaction to the U.S. Supreme Court decision in *Leathers v. Medlock* has been confined to the trade and popular press, although the case is certain to receive scholarly attention, given more time. The literature reported the reactions of both cable operators and representatives of governments that regulate cable. The reactions of both groups were mixed, although the cable operators were generally negative, as could be expected, with government representatives viewing the decision in a more positive light.

The literature reported discussion of the case's implications for taxation of cable and for other forms of cable regulation. Also, the literature discussed the implications of *Leathers* for the other media.

The primary focus of the literature was on a discussion of what impact, if any, the *Leathers* decision would have on future taxation of cable television. Broadcasting magazine described *Leathers* as "a setback to the cable industry."[8] It quoted a cable industry attorney as saying the ruling gives states "a green light"[9] to tax the medium and quoted a cable executive as

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[8] Matt Stump, *Supreme Court upholds Arkansas cable tax*, Broadcasting, Apr. 22, 1991, at 52.

[9] *Id.* (quoting Eugene Sawyer, attorney with Jack, Lyon & Jones).

saying, "This decision will provide the impetus for more states to use cable as a source of general revenue."[10] Likewise, The Wall Street Journal said the decision "may encourage some state and local governments to extend their sales taxes to cable service as a way of raising revenues."[11]

However, the same Journal story also reported that a Washington, D.C., attorney who represented several cities in cable matters doubted that local officials would rush to impose new taxes. The attorney was quoted as saying, "I would think people would be looking at the possibility, but I wouldn't expect that the floodgates would suddenly open."[12] Similarly, Broadcasting magazine reported that the National Cable Television Association was downplaying the ruling's significance for taxation of cable. The magazine reported that "the states most likely to tax cable have already done so, and that efforts in other states . . . would continue regardless of the Supreme Court ruling."[13]

Also at issue in the trade literature was whether *Leathers* answered or helped to answer the larger question of how much First Amendment protection is to be granted to cable. The conclusion, according to the trade literature, was that *Leathers* might be most important because of what it didn't do. According to a story in the Los Angeles Times, government representatives were pleased that while the Court recognized First Amendment protection for cable, it did not broaden that protection. "The

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[10] *Id.* (quoting Robert Sachs, senior vice president, Continental Cablevision).

[11] Stephen Wermiel, *Court Upholds State Sales Tax On Cable TV*, Wall St. J., Apr. 17, 1991, §B, at 1.

[12] *Id.* (quoting Larrine S. Holbrooke).

[13] Stump, *supra* note 8.

court did not equate cable TV with the press [which generally receives greater First Amendment protection than the other media]. That could have caused us a lot of problems," said an attorney who represents Los Angeles in cable matters.[14] Cable industry representatives reportedly were disappointed — but relieved that the justices did not retreat from an earlier ruling giving cable broadcasters some First Amendment protection. "This decision does not indicate that cable is a lesser member of the press," a cable industry attorney told the Los Angeles Times.[15]

Also, Broadcasting magazine quoted a cable attorney who said the First Amendment ramifications of the decision were "minimal to nonexistent. The whole decision is from a tax standpoint, not from a cable expression or regulation standpoint. . . . This is a scalpel approach."[16] The Los Angeles Times said O'Connor's narrowly written opinion "does not settle the far more significant question of whether the First Amendment forbids local governments from regulating cable TV."[17] For example, the newspaper observed, the case left unanswered the questions of whether a municipality can require local cable operators to wire all homes in the area or to set aside public access channels. Such requirements are being challenged in the lower federal courts by cable operators who point out that the First Amendment would not allow the government to make similar demands of newspapers.

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[14] David G. Savage, *High Court Allows Cities, States to Tax Cable TV*, Los Angeles Times, Apr. 17, 1991, §D, at 2 (quoting Larrine S. Holbrooke).

[15] *Id.* (quoting Jeffrey Sinsheimer, attorney for Cable Television Assn. in Oakland, Calif.).

[16] Stump, *supra* note 8 (quoting Paul Glist, attorney with Cole, Raywid & Braverman).

[17] Savage, *supra* note 14.

However, The Wall Street Journal reported that one government attorney predicted the ruling would boost local government efforts to regulate cable activities of all sorts, "from payment of franchise fees to the use of public utility poles. The court is recognizing, she said, that the fact that cable is engaged in a form of speech doesn't mean a city can't tax it or regulate it."[18]

Finally, an article in Editor & Publisher discussed the implication of *Leathers* for the newspaper industry.[19] It quoted the general counsel for the National Newspaper Association as saying the decision is particularly good news for small newspapers. The basis for that conclusion is the Supreme Court's use of *Leathers* in two subsequent cases involving taxes that applied to magazines but not to newspapers. Just a few days after announcing its *Leathers* decision, the Court used *Leathers* as precedent to leave in place an Iowa Supreme Court ruling that upheld a state tax that was levied on magazines but from which newspapers were exempt[20] and to vacate and remand a Florida Supreme Court decision that disallowed the distinction between magazines and newspapers for tax purposes.[21] This suggested that tax schemes in several other states that tax magazines but exempt newspaper are constitutional. In the past, state courts have invalidated such schemes.

The *Leathers* decision clearly looks less encouraging for magazines than newspapers. The Wall Street Journal reported, "Besides the cable

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[18] Wermiel, *supra* note 11.

[19] Debra Gersh, *Singling out one medium for taxation allowable: U.S. Supreme Court rules 7-2 it does not violate the First Amendment*, Editor & Publisher, May 4, 1991, at 62.

[20] Hearst Corp. v. Iowa Dep't of Finance and Revenue, 461 N.W.2d 245 (Iowa S.Ct. 1990), *cert. denied*, 111 S.Ct. 1639 (1991).

[21] Miami Herald Co. v. Dep't of Revenue, 111 S.Ct. 1614 (1991).

industry, the most immediate impact of the ruling will be on magazines that are taxed in several states that exempt newspapers."[22] The paper noted that a brief filed in the *Leathers* case explained that "this pattern occurs because local newspapers have considerable clout with local lawmakers that isn't shared by magazine publishers."[23]

Thus the literature on *Leathers* included the initial reactions of some of the people engaged in the operation and regulation of cable systems to the decision. None of the trade literature, however, thoroughly examined the case's impact on the general rules of law governing media taxation or explained how the Court arrived at its decision. This paper will attempt to fill those gaps in the literature.

This paper addresses the following research questions:

1) Does *Leathers* change the general direction of the developing body of law regarding the constitutionality of media taxes? If so, how?

2) What rules now govern taxation of the media?

FROM *MINNEAPOLIS STAR* TO *LEATHERS*

Any attempt to determine how the Supreme Court decision in *Leathers* changed the law must, of course, begin with a description of major case precedents and rules of law that governed taxation of the media prior to *Leathers*. The leading case on the taxation of the mass media prior to *Leathers* was *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* (1983).

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[22] Wermiel, *supra* note 11.

[23] *Id.*

Minneapolis Star is notable for its strong condemnation of taxes that target only the media or some portion of them. In *Minneapolis Star*, Minnesota newspapers claimed that the state's use tax on ink and paper, which only applied to newspapers and then only to the state's largest newspapers, violated the taxed papers' constitutional rights to freedom of the press and equal protection. The tax law discriminated between newspapers and other businesses and between newspapers of different sizes. On those two grounds, the law was held to be unconstitutional. Justice O'Connor, for the Court, wrote this stinging condemnation of selective taxation:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. . . . When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute.[24]

The fact that the Court strongly condemned taxes aimed at the media in *Minneapolis Star* and then allowed them in *Leathers* suggests that the Court changed directions in the eight years between those decisions. However, the decisions warrant further examination because there also is some evidence to suggest that *Leathers* does not contradict *Minneapolis Star*. For example, O'Connor wrote for the majority in both cases and cites *Minneapolis Star* as precedent for parts of her *Leathers* ruling.

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[24] Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. at 585.

Also, the significance of *Leathers* becomes clearer in the context of media tax cases decided during the eight years between *Minneapolis Star* and *Leathers* . The context reveals that two increasingly distinct lines of media tax cases were developing during those years. *Minneapolis Star* is part of one line; *Leathers* is part of the other.

The primary difference between the two lines of cases is the type of tax being challenged by the media plaintiffs. *Minneapolis Star* is part of the line of cases about **taxes that single out the media**. For example, the tax challenged in *Minneapolis Star* was levied on publications that consumed more than $100,000 worth of paper and ink in any calendar year. In effect, that meant that only a handful of publishers had to pay the tax. For purposes of this discussion, the line of cases about taxes that single out the media will be called the *Grosjean-Minneapolis Star* line. *Grosjean* will be discussed below.

Leathers, on the other hand, is part of the line of cases about **generally applicable taxes from which some media are exempt**. In *Leathers*, for example, the tax in question was a generally applicable sales tax. It was levied on all businesses — not just the media — but some sales were exempted, including subscription and over-the-counter newspaper sales and subscription magazine sales. This second line of cases will be called the *Regan-Leathers* line.

Although the Supreme Court decided its first media tax case 50 years ago, the two lines of cases do not become distinct until after *Minneapolis Star*. Two months after *Minneapolis Star*, the Court decided *Regan* without even mentioning *Minneapolis Star*, apparently because the cases were from different lines. When the Court did cite a case from the other line, the case usually was distinguished based on its facts. For example, the *Leathers* decision distinguished *Minneapolis Star* based on its facts.

Distinguishing between the two lines of cases and the two types of taxes is important because they are treated differently by the Court. In the view of the Supreme Court, taxes that single out the press are so significantly different from generally applicable taxes that the Court applies different standards to evaluate the constitutionality of each type.

THE *GROSJEAN-MINNEAPOLIS STAR* LINE OF CASES

This line of cases began years ago with *Grosjean v. American Press Co.* (1936).[25] *Minneapolis Star*, which was discussed above, was added to the line in 1983.

In *Grosjean* the U.S. Supreme Court ruled that a Louisiana license tax imposed only on newspapers that sold advertisements and had a circulation of more than 20,000 copies violated the First Amendment's free press provision. The law was passed at the behest of the governor to punish the state's largest daily paper, the governor's constant critic. The Court observed that the tax was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled. . . ."[26]

THE *REGAN-LEATHERS* LINE OF CASES

This line of cases began 50 years ago when the Court first ruled that the First Amendment does not protect the media from generally applicable economic regulations. For example, in *Associated Press v. National Labor*

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[25] Grosjean v. American Press Co., 297 U.S. 233 (1936).

[26] *Id.* at 250.

Relations Board (1937), the Supreme Court said the application of the National Labor Relations Act to the wire service did not violate its First Amendment rights.[27] The Court said, "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws."[28] During the next decade, the Court used that principle to decide that the media are not exempt from generally applicable federal anti-trust regulations[29] or from the provisions of the generally applicable federal Fair Labor Standards Act.[30] In 1946 the Court decided a media exemption case, which more closely resembles *Leathers*. In *Mabee v. White Plains Publishing Co.*, the Court ruled that the federal Fair Labor Standards Act of 1938 did not violate the First Amendment by exempting small-circulation weekly or semiweekly publications.[31] The Court distinguished the case from *Grosjean*, saying the federal law was not "a deliberate and calculated device" to penalize a small group of newspapers.[32]

This line was clearly distinguished by the Court in *Regan v. Taxation with Representation of Washington* (1983).[33] In *Regan* the Court cited the cases above and ruled that denying a non-profit group a tax exemption

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[27] Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937).

[28] *Id.* at 132.

[29] Associated Press v. United States, 326 U.S. 1 (1944).

[30] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

[31] Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946).

[32] *Id.* at 184, quoting Grosjean v. American Press Co., 297 U.S. at 250.

[33] Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983).

because it engaged in lobbying was not a constitutional violation because choosing not to subsidize a First Amendment activity does not violate the First Amendment.

In *Leathers*, O'Connor said *Regan* "stands for the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas."[34] She added that *Regan* also stands for this proposition: "Inherent in the power to tax is the power to discriminate in taxation."[35]

In 1987 the Supreme Court decided *Arkansas Writers' Project, Inc. v. Ragland*,[36] which fits into this line of cases although the majority did not handle it as if it did. In *Ragland* the Court ruled unconstitutional a generally applicable state tax from which newspapers and religious, professional, trade and sports magazines were exempt. General interest magazines were taxed. The Court ruled that although the tax was generally applicable, it violated the First Amendment because it targeted a small group of magazines (only one or two had to pay the tax) and because a magazine's tax status depended on its content, which the Court said was "particularly repugnant to First Amendment principles."[37] The Court said the state's justifications for targeting the small group of magazines — raising revenue and encouraging "fledgling" publishers[38] — were not compelling.

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[34] Leathers v. Medlock, 111 S.Ct. at 1445.

[35] *Id.* at 1446.

[36] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

[37] *Id.* at 229.

[38] *Id.* at 232.

Also in the *Regan-Leathers* line is the Iowa Supreme Court's opinion in *Hearst Corp. v. Iowa Department of Finance and Revenue* (1990).[39] The Iowa Supreme Court ruled that the constitutional rights of a free press and equal protection were not violated when Iowa exempted newspapers and shoppers' guides from a general sales and use tax but did not exempt magazines and other periodical publications. The Iowa court said Iowa's tax scheme was distinguishable from those voided by *Minneapolis Star* and *Ragland* because it did not create a special tax that applied to only certain publications and was not tailored to single out small groups of publications. It said *Hearst Corp.* was about a tax that applied to all businesses but exempted newspapers. The Iowa court relied in part on *Regan*.

Shortly after the Supreme Court issued its decision in *Leathers*, it denied cert in *Hearst Corp.*, suggesting further that *Hearst Corp.* is part of the *Regan-Leathers* line of cases.

EVALUATING TAXES THAT SINGLE OUT THE MEDIA

In cases about taxes that single out the media or some segment and that do not apply to all businesses, the Court assumes that the legislature's motive for taxing the media was an improper one. In *Minneapolis Star*, which involved a tax imposed only on a few newspapers, O'Connor said that Minnesota's tax scheme was not allowed because "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such

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[39] Hearst Corp. v. Iowa Dep't of Finance and Revenue, 461 N.W.2d 295 (Iowa S.Ct. 1990), *cert. denied*, 111 S.Ct. 1639 (1991).

a goal is presumptively unconstitutional."[40] The Court stated explicitly that it did not impugn the motives of the Minnesota legislature. Rather, it said, "We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[41]

A tax that singled out the media or some portion of them would be allowed, however, if the government could prove a compelling governmental interest that could not be achieved without differential taxation. This is called a strict scrutiny standard of review. In *Minneapolis Star*, the Court used the strict scrutiny standard because it presumed an infringement of freedom of the press based on the tax scheme's potential for infringement. Then the Court required the government to prove an overriding governmental interest that could not be achieved without differential taxation. The state said its interest was in generating revenue, but the Court said that did not satisfy the demands of the test.

EVALUATING GENERALLY APPLICABLE TAXES

Contrary to its assumption that taxes that single out the media are unconstitutional unless properly justified by the government, the Court assumes that a generally applicable tax is not a threat to First Amendment freedoms of the media because it applies to all businesses. The *Leathers* Court

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[40] Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. at 585.

[41] *Id.* at 592.

said, "The tax does not single out the press and does not therefor threaten to hinder the press as a watchdog of government activity."[42]

As in *Regan, Hearst Corp., Ragland* and *Leathers*, however, First Amendment questions arise when one medium or segment of a medium is exempt from a generally applicable tax and another is not. The Court's decision in *Leathers* provides the current rules for determining whether a particular tax exemption scheme violates the First Amendment. Those three rules are listed above in the introduction to this paper.

In essence, **the burden is on the media** to prove that the structure of a generally applicable tax scheme constitutes a threat to their First Amendment-protected activities. This is a significant difference from the rules governing taxes that single out the media. In those cases, the courts employ a strict scrutiny standard of review, and **the government bears the burden** of justifying its tax scheme. In *Leathers*, however, there was no presumed or proven First Amendment violation; therefore, the strict scrutiny standard was not applied.[43] Writing for the Court in *Regan*, Justice William Rehnquist said that Congress' decision not to subsidize the exercise of a fundamental right does not infringe that right; therefore the law is subject to a mere rationality standard of review to decide the equal protection question, not strict scrutiny.

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[42] Leathers v. Medlock, 111 S.Ct. at 1444.

[43] In cases like this, the courts generally apply a mere rationality standard, which only requires the government to show a rational reason for its discriminatory regulation in order to defeat a challenge on equal protection grounds. This standard has been used in most cases challenging general taxation of the media, and most of those challenges have been rejected by the courts. However, the *Leathers* Court remanded the equal protection questions. Todd F. Simon, *All the News That's Fit to Tax: First Amendment Limitations on State and Local Taxation of the Press*, Wake Forest L. Rev. 59, 73 (1985).

In *Ragland* the Court found violations of what it would later articulate as the second and third *Leathers* rules — the rules that the tax may not select a small group of speakers to bear the burden of the tax and that even generally applicable taxes cannot discriminate between members of the same medium based on content. That analysis would appear to be sufficient for finding the Arkansas tax scheme unconstitutional. However, the Court also applied a compelling-government-interest test, which currently does not appear to be the appropriate standard for cases involving generally applicable taxes. Justice Antonin Scalia and Chief Justice Rehnquist dissented in *Ragland* partly on that basis, that the majority applied too stringent a standard of review. In retrospect, the Court's use of the compelling-government-interest test in *Ragland* may be no more than an illustration the uneven manner in which the law evolves.

CONCLUSIONS

The primary conclusion of this paper is that the Supreme Court's 1991 decision in *Leathers v. Medlock* does not represent a substantial change in the law governing taxation of the media as others have claimed it does. Rather than contradicting *Minneapolis Star*, *Leathers* is clearly in a different line of cases; it represents one more step in the evolution of that line. The *Minneapolis Star* line is about taxes that single out the media. The *Leathers* line involves generally applicable taxes.

The two lines of cases suggest that the Court perceives serious First Amendment threats emanating from taxes that single out the media. The Court has said that such taxes have such a strong potential for abuse that they are assumed to violate the First Amendment. On the other hand, the Court

sees little danger in generally applicable taxes, even if some segments of the media are exempted and others are not.

The two lines of cases also suggest that the courts will continue to apply a strict scrutiny standard of review in cases involving taxes that single out the press. In those cases, the burden is on the government to prove that the tax serves a compelling governmental interest that cannot be achieved without differential taxation. In cases involving a generally applicable tax from which some segment or segments of the media are exempt, however, the burden is on the media to prove that the tax is structured in such a way as to infringe upon First Amendment-protected activities. *Leathers* holds that in order for a generally applicable tax to be constitutional:

1) The tax must be structured in a way that does not interfere with the First Amendment activities of the media or raise suspicions that it was intended to do so.

2) The tax may not select a small group of speakers to bear the burden of the tax.

3) The tax cannot be content based.

The importance of tax issues for the media cannot be overstated — either in First Amendment terms or in financial terms. In First Amendment terms, the ability of the government to structure taxes in ways that threaten the free flow of information about the government to the public should continue to concern the media and the public as more state and local governments consider media taxes. While *Leathers* does not change the law significantly, neither does it offer strong protection against governments that desire to single out a particular medium to bear an extra financial burden — whatever the motive. And the facts of *Leathers* suggest the financial

implication of media taxes. At stake in that case was $8.5 million paid by Arkansas cable companies during a two-year period.[44]

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[44] Stump, *supra* note 8.

THE MORTGAGE REDLINING CONTROVERSY, 1972-75

National People's Action Takes on the Lenders and Wins Anti-Discrimination Legislation in Congress

A Case Study in Social Problems and Agenda Building: The Role of Reformers, Lawmakers and Media in Public Policy Making

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I. Introduction

In 1975, Congress passed the Home Mortgage Disclosure Act.[1]

The bill, which required banks and savings institutions to keep and disclose records on mortgage lending patterns, seemed innocuous and captured comparatively little national attention at the time. However, HMDA was a major victory for a small network of community activist groups who had organized to reform what they believed was a serious social problem: mortgage redlining.

This paper analyzes the success of these activists, who accomplished what many thought was an impossible feat: passage of national legislation in a brief three-and-a-half year period, from 1972 to 1975. It traces the origins of the anti-redlining movement, its success in capturing the attention of a sympathetic lawmaker and his staff, and the reformers' and lawmakers' use of the media to advance the issue on the public policy agenda.

Redlining: A Classic Case of A Social Problem

Redlining is defined generally as the refusal by lending institutions to make mortgage or home improvement loans in geographic areas they deem risky.

The term *redlining* stemmed from the allegation that lenders drew lines on maps using red pens to demark areas where they would not lend. The result is *disinvestment*, or the outflow of existing and potential investment capital from the neighborhood.

Such practices had been prevalent in mortgage lending for many years, and the worst abuses might have actually ended by the time the problem was discovered in the 1970s and made into a major political issue.[2]

Redlining was constructed as a social problem when neighborhood groups identified lending practices as a contributor

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[1] PL94-200; 89 Stat. 1125 et seq.; 12 USC 2801-2809.

[2] Jack M. Guttenberg and Susan M. Wachter, Redlining and Public Policy (New York University School of Business Administration Salmon Brothers Center for Study of Financial Institutions Monograph, 1980):49.

to neighborhood deterioration and recognized that private financing was essential in the aftermath of a reduction in federal housing programs.[3] These groups believed that they could reverse the trend and promote *community reinvestment* by bringing pressure on banks, state and local governments, and Congress.

A Case in Agenda-Building

Beyond its significance as a social problem, the passage of HMDA is an interesting case in the interactions of social reformers concerned with a particular issue and the political and media institutions.

This examination relies on the *agenda-building* model proffered by Cobb and Elder, who define an issue as "a conflict between two or more identifiable groups over procedural or substantive matters related to the distribution of positions or resources."[4]

Cobb and Elder suggest that, first, issues are identified, usually by one or more contending parties who perceive an unfair bias. These parties then attempt to expand the issue, utilizing symbols and often employing the media, to gain access to the public (or systemic) agenda of discourse. Issues then emerge on the policy (legislative or regulatory) agenda. Following an in-depth review of the events, this paper analyzes the anti-redlining movement within the context of the social movements, agenda-building and public policy.

II. Prelude: Origins and Development of the Movement; Identification and Early Expansion of the Issue

The anti-redlining movement began at a conference of neighborhood organizations held in March 1972, in a parish hall on the Northwest side of Chicago. The organizer was Gale Cincotta, a Chicago activist, who would emerge as the leader of the movement.[5]

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[3] For a review of housing history, especially the major equal housing advancements in the 1960s under John F. Kennedy and Lyndon Johnson, and the subsequent dismantling of federal housing programs in the early 1970s under Richard Nixon, see Nathaniel S. Keith, Politics and The Housing Crisis Since 1930 (New York: Universal Books, 1973).

[4] Roger W.Cobb and Charles D.Elder, Participation in American Politics: The Dynamics of Agenda Building, 2nd ed., (Baltimore: Johns Hopkins University Press, 1972), 82.

[5] Cincotta, a 40-year-old housewife with six children, whose Irish and Italian husband managed a filling station, was described as "La Pasionara" of the anti-redlining movement. She began her community activism with local schools, and was president of a several community groups involved in housing issues, including the Organization for a Better Austin and later the West Side Coalition, which were incorporated into her later activities. As an organizer, Cincotta represented one of the many women who have provided a high proportion of the leadership in American reform movements. See Kurt Lang and Gladys Lang, "The Dynamics of Social Movements," in Louis Genevie (ed.), Collective Behavior and Social Movements (Itasca,IL: Peacock, 1978). Today, she continues as a housing activist as head of National People's Action and the National Training and Information Center in Chicago. For details on the movement's early history, see Bob Kuttner, "Ethnic Renewal," New York Times Magazine (May 9, 1976), ___; Mike Kolbenschlag, "Guerrilla War Over Redlining Jars Chicago, Threatens to Spread," Housing & Home 47 (July 1975), 8; and Jerry DeMuth, "How Housing Alliance Pulls Neighborhood Groups Together," Chicago Sun-Times, June 1, 1975; Ernest Holsendolph, "Neighborhoods Turn to Self-Help for Preserving and Improving," New York Times, July 6, 1976.

The 1,600 attendees, who represented cities in 39 states, were all concerned with community problems. These included housing-related issues, such as then-prevalent racial blockbusting, housing speculation, and the displacement of conventional lenders (banks and savings and loans) by mortgage bankers (who offered FHA-insured loans). A informal network between groups in various cities had emerged over the years, but there was no formal structure.

Cincotta recalls that she had little idea beforehand that the event would be so successful or would be the catalyst for a major national movement. "We all recognized that even though we had made advances in our own cities, at a certain point we had to make an impact nationally. We touched a nerve," she adds.[6]

Cincotta called upon a dozen politicians to appear (including Presidential hopeful Eugene McCarthy) and invited media to cover. New York Times reporter John Herbers captured the flavor of the event:

> It was an unusual gathering in that it brought together in a display of harmony racial groups that traditionally have been antagonistic to each other in changing central city neighborhoods.
>
> "We have a new enemy now," said Mrs. Bernice Davis, a black leader in the West Side Coalition, which organized the conference, as Edward Stedaniak, a leader in the Chicago Polish community, nodded in agreement.
>
> The enemy is felt to be a combination of the F.H.A and real estate, lending and insurance interests that the delegates charged had damaged the various inner-city groups in different ways as the more affluent residents moved to the suburbs.
>
> Mrs. Gale Cincotta, a coordinator of the conference and platinum blonde who wears an "I'm Staying" (in the central city) button on her blouse, summed up the disturbing belief that is moving inner-city residents to anger against institutions rather than against other residential groups.
>
> "What for so long has been considered a natural phenomenon--change in neighborhoods, deteriorating cities--are not natural," she said. "It's a plan and somebody's making a lot of money out of changing neighborhoods."[7]

Out of the conference, National People's Action for Housing was organized. An affiliated organization, the Housing Technical Information Center, which Cincotta would direct, was created to

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[6] Gale Cincotta interview with author November 7, 1991.

[7] John Herbers, "1,600 From Ethnic Groups Organize Against Institutions They Say Are Destroying Central Cities," New York Times, March 20, 1972.

provide communications and training support to local groups.[8] HTIC, also distributed mimeographed bulletins and began producing a full-fledged newsletter in August 1974, aptly titled Disclosure.

In Chicago, Cincotta created the Metropolitan Area Housing Alliance as an affiliate of HTIC to coordinate local activities.[9] These ranged from lobbying local housing officials one-on-one and at public meetings[10] to an array of disruptive tactics.

Although the group never advocated nor employed violence, Cincotta was no stranger to utilizing protest tactics. Before the formation of NPA, her group who held "bank-in's" at local institutions,[11] and the group subsequently engaged in a variety of protests. The group held a "Slum Day" in the municipal court targeted against slumlords[12] and drew attention to neighborhood rat problems by putting a dead rodent in an alderman's office.[13] The group also organized a front-porch confrontation against the state attorney general,[14] staged sit-ins and organized challenges of the Chicago HUD and FHA offices[15], staged surprise visits to the

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[8] NPAH's name was soon shortened to National People's Action (NPA), and the Housing Technical and Information Center's name was changed to the National Technical and Information Center (NTIC), reflecting the broader emphasis on neighborhood issues, not just housing, that the groups would eventually tackle.

[9] By the time MAHA was formed in November 1973, the old Westside Coalition had reorganized as two different issue-oriented groups--the Chicago Area Mortgage Coalition, which fought redlining, and the Chicago Area FHA Coalition, which tried to cope with HUD problems. About 12 community organizations belonged to each at the time of MAHA's creation, and they continued. By June 1975, about 30 community groups were part of MAHA.

[10] See "Housing Rehab Cited Most Often in Housing, Austin (Ill.) Journal, December 26, 1974; "MAHA Asks More Community Involvement in Urban Renewal," Chicago Sun-Times, December 8, 1974.

[11] New York Times, 1976

[12] See Richard Philbrick, "7 City Slumlords to Appear in Court," Chicago Tribune, December 22, 1973; "Metro Housing Group Prompts Court Action," The Journal, January 2, 1974; Jerry Kohler, "Court to Lump Continuances," Uptown News, January 2, 1974; Jerry Kohler, "Housing Court Judge Takes Firm Hand in Case," Uptown News; Scott Jacobs, "Same Slum Story: To Be Continued," Chicago Sun-Times, January 29, 1974; Larry Weintraub, "Tenants, Landlords Thrash Out Woes in Civic Center," Chicago Sun-Times, January 23, 1974; "Judge Orders Action on Vacant Buildings," The Journal, January 30, 1974; "Ready for Slumlords," (photo), Chicago Defender, January 23, 1974; Robert Unger "Slumlords Face Fines, Jail: Judge," Chicago Tribune, February 17, 1974.

[13] Carol Memmott, "Activist Fights for Housing," USA Today, April 10, 1989, 2A.

[14] See Martin Fisher, "MAHA Members Pay Surprise Visit to Carey," Community Publications, February 6, 1974; "City Building Removal Team Called Remiss by Carey," Chicago Sun-Times, February 1, 1974, 30; Lillian Williams, "Carey Pledges Push to Stiffen Slumlord Terms," Chicago Sun-Times, February 6, 1974; Mark Fazlollah, "Landlords Sign for Repairs," Lerner Newspapers, February 25, 1974.

[15] See Stanley Ziemba, "HUD OKs City Coalition's Demands on Vacant Homes," Chicago Tribune, August 22, 1974; "MAHA Sues HUD on Vacancies," South End Review, September 18, 1975. Also,"Adlai Blasts HUD's Footdragging in Program Aiding Home Owners," Chicago Tribune, December 26, 1974; "Housing Coalition Gains Aid," South End Citizen, December 27, 1974. Also Stanley Ziemba, "FHA Office Here Occupied in Protest," Chicago Tribune, October 9, 1975; Terry Shafer, "HUD Chief Promises Crackdown on Quick Foreclosures," Chicago Daily News, October 21, 1975; William E. Farrell, "HUD Secretary Jeered by Chicago Homeowners," New York Times, October 21, 1975; Mike Kolbenschlag, "Carla Hills Jeered at Homeowners Protest Meeting in Chicago," Housing & Home, December 1975; "Mrs. Hills Takes the Heat," Chicago Tribune (editorial), October 24, 1975.

Chicago offices of the S&L trade association[16], and picketed allegedly unscrupulous mortgage bankers.[17]

Apart from such protest actions, NPA and its HTIC affiliate recognized that being able to document instances of neighborhood deterioration was critical for obtaining reforms. In instances of discrimination, such as refusal to sell a house to a minority purchaser, proof was generally not necessary. Everyone could agree on the facts, and the arguments centered on moral grounds.

Neighborhood disinvestment was different. Banks consistently denied that redlining took place and argued that neighborhood decay was due to many factors. The unit of analysis was whole neighborhoods, and in order to establish that disinvestment occurred as a result of loan practices, NPA had to have proof.

Beginning in 1972, MAHA, as the NPA local affiliate, began studying housing patterns in Chicago. The group would select particular neighborhoods to determine demographics, the kind of housing stock, costs and family income figures based on census data. Then, using property records available on microfilm in the basement of Chicago City Hall, they would compare lender data.

Cincotta recalls, "One neighborhood would have all conventional financing; and the other was all FHA. The only difference was that one was in the suburbs and all white, and the other was inner-city and black."

The work was time-consuming, but essential. And while MAHA's initial studies were crude, they became increasingly sophisticated. HTIC also trained affiliate groups in other cities to do similar analyzes. The process not only provided essential data, but underscored what was needed: access to information. While groups such as NPA could ferret out the facts themselves, a more expedient way would be to require lenders to disclose the data themselves.

Redlining Emerges as a National Issue

In 1972, redlining as a term was virtually unknown.[18] Cincotta claims that she and her group popularized the term, although NPA might not have been the first to coin the phrase.[19]

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[16] See "Activist Group Calls on U.S. League with Urban Lending Demands," Savings & Loan News 96 (June 1975), 15. Also see Stanley Ziemba, "Savings Group's Plan Assailed as Redlining," Chicago Tribune, November 24, 1975 and "Clash on Redlining," (photo), Chicago Tribune, November 25, 1975. As background, see Dennis Bryne, "S&Ls Map Red-Line Strategy," Chicago Daily News, May 9, 1975; "Antiredline Disclosure Drive Hit by Annunzio," American Banker, July 16, 1975; and "Call for Aid on Loans in Cities," Chicago Daily News, September 20, 1975.

[17] See Stanley Ziemba, "Many Facing Eviction March on Mortgagee," Chicago Tribune, May 28, 1975; Michael Flannery, "Loan Firm Sues to Bar Protesters," Chicago-Sun Times," May 29, 1975; "Refuses to enjoin Protesters," South End Citizen, June 13; 1975.

[18] Kuttner, "Ethnic Renewal," 25.

[19] Gale Cincotta interview.

At NPA's third annual conference, held in April 1974, the group announced plans to take on the redlining issue. Their tactic was simple: to press for the full national disclosure of savings and loan data by institutions in order to show the extent of redlining and disinvestment from older neighborhoods. As a neighborhood newspaper noted, delegates "agreed to use whatever tactics they felt comfortable with -- letter writing, petitioning, picketing or lobbying -- to put pressure on Congress and the federal regulatory agencies...."[20]

The timing was right. Across the country affiliates of the NPA had made significant gains in Chicago, Baltimore, Minneapolis-St. Paul, Cincinnati, Milwaukee and other cities.[21] Meanwhile, in Cincinnati, a middle-age professional couple was turned down for a loan on a house in a racially transitional neighborhood. They sued the lender, and the first court decision on the redlining issue concluded that redlining was illegal.[22]

NPA launched its campaign partly in frustration with the lack of action by federal regulators. They had chastised the four federal banking regulators and HUD for failure to enforce the anti-discrimination provisions of the Civil Rights Act of 1968, after two regulatory studies revealed clear evidence of discrimination.[23]

In particular, the groups targeted the now-defunct Federal Home Loan Bank Board, because the savings and loans they regulated were organized as specialized mortgage finance institutions and originated half of all mortgage loan volume. A Wall Street Journal story summed the regulators' attitudes this way:

> Thomas R. Bomar, chairman of the Federal Home Loan Bank says his agency "probably has the authority to require full disclosure" from the more than 2,000 federal savings and loans it regulates nationally but "we're not sure this is an appropriate function for us to get into." He adds: "We're set up to regulate primarily the solvency of these institutions. To make a major jump into this new field would require at least a $100 million addition to our budget and a 50% increase in our 850-member examining staff. We're not sure it's worth it.[24]

In the same article, Cincotta replied:

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[20] Martin Fischer, "Disclosure Drive Planned by NPAH," Austin Journal, April 24, 1975.

[21] For a recap, see Terry P. Brown, "Critics Say Lenders Hasten Urban Decay by Denying Mortgages," Wall Street Journal, April 5, 1974, 23; "The Fight for Urban Reinvestment," Savings and Loan News (June 1975), 46; Jean Caffey Lyles, "The Self-Fulfilling Prophesy of Redlining," The Christian Century 91 (April 3, 1974), 355-57; "Greenlining of America," Time 103 (May 27, 1974), 73.

[22] The U.S. District Court, Southern District of Ohio, later upheld the trial court decision that redlining was a violation of the Civil Rights Acts of 1968 on February 13, 1976. 404 FSupp. 761 (DC Ohio) 1976. See "The Law Closes in on Mortgage Discrimination," Business Week (March 22, 1976), 143.

[23] John N. Collins, "Redlining: A Black and White Issue?," Illinois Issues 9 (July 1979):4-9.

[24] Brown, "Critics Says Lenders Hasten Urban Decay...," 23.

"We think the industry and the regulatory agencies should be able to come up with some ideas for ways to stop redlining," says Mrs. Cincotta. "So far we're only getting a lot of stopgap measures and bureaucratic runaround while our neighborhoods are going down the drain.

"I'm not sure we need new laws and regulations, but something has to be done," she continues. If we don't get responsible action from more savings and loan executives soon, a lot of them are going to get tired of seeing us on their front yards and in their offices."

NPA pursued the Bank Board aggressively, roasting the Bank Board representative who agreed to appear and at its national conference,[25] lambasting the agency in successive issues of Disclosure,[26] and picketing the home of the regional principal supervisory agent for the agency. As a result, federal regulators finally announced they would conduct a joint study program, which could be drawn into the debate later (see page 20-21).

Gaining Local and State Government Support

In part because of the NPA's agenda, national media had started to focus on the issue. In May 1974, for example, Time noted, "Now a spirited fight against redlining is mounting across the U.S. by the residents of declining neighborhoods. Their tactic: to make investments in the inner city financially attractive to lenders once again, a process that community groups call 'greenlining.'"[27]

Local officials had also begun to respond.

As part of Cincotta's local strategy to gain legitimacy for the issue, NPA had held extensive discussions with the staff of Chicago Mayor Richard J. Daley, who was sympathetic to concerns of neighborhood decay. When Daley attended NPA's third annual conference, the controversial politician was greeted by a combination of boos and applause. However, he received rave applause when he announced support for disclosure of loan and deposit data by local banks.[28]

Chicago soon passed the first municipal disclosure ordinance in the country--a pivotal event in the movement.[29] By getting a

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[25] Martin Fisher, "Disclosure Drive Planned by NPAH," Journal, April 24, 1974. See also Dexter Hutchins, "Fuss Develops Over Redlining By the S&Ls--But There's No Rule Against It," Housing & Home 46 (August 1974):24.

[26] HTIC, "The Next Move," Disclosure, no. 2 (September 31, 1974):12.

[27] "Greenlining of America," 72.

[28] Peggy Constantine, "Daley Backs Full Disclosure of Redlining Data by S&Ls," Chicago Sun Times, April 27, 1974.

[29] A month earlier, MAHA had persuaded Alderman Dick Simpson to introduce an ordinance specifying that any bank wanting to serve as city depository had to prove observance of an anti-redlining pledge by providing detailed annual reports. When considered by the Council's Finance Committee in early June, the bill was actually strengthened to include business loans, to make reporting by census tract versus zip code, and to include savings institutions. The ordinance passed in late June after

major city to agree to require disclosure, the group could prove that a legislative remedy worked. They also had a tool that they could use to generate the important most commodity in their fight: facts. The March 1975 issue of Disclosure reported the first results under the new reporting scheme:

> HTIC found that 41 Chicago banks, including all of the large loop banks except Harris Trust and Savings Bank and Northern Trust Bank, who filed completed disclosure information invested less than one-tenth of one percent of their $442 billion of assets in home loans in Chicago neighborhoods in 1973. Even if you compare their total housing lending to their savings deposits, you still find that their total housing investment in 1973 was only 1.5 percent of their savings deposits from Chicago neighborhoods. Traditionally, people's savings have been the primary source of housing credit and, consequently, when the bankers decide to use that money elsewhere, there is a serious shortage of housing credit. The result of the banker's failure to invest in housing loans is that many of Chicago's most viable communities are threatened by the destructive forces associated with the unavailability of mortgage funds.

In concluding, the newsletter added:

> One interesting aspect of the Chicago disclosure is simply that the banks did it. All across the country, the bankers are crying that disclosure is too expensive for them to do. Yet in Chicago, we find that at least 41 banks found the incentive of holding city funds strong enough to compensate for any additional costs of disclosure. Any number of these banks found that disclosure by census tract was just as easy as disclosure by zip code and, consequently, disclosed by census tract in the first year although it was not required. The experience in Chicago clearly proves that the arguments of the banks against mandatory disclosure are not realistic in any way.[30]

Not to be outdone by Mayor Daley, Peter Kasaros, an aide to Governor Dan Walker, told the same conference attendees that his boss would appoint a 27-member Blue Ribbon Panel Commission on Mortgage Practices and announced the state would issue a regulation barring state-chartered banks from redlining.[31]

Illinois' 350 state-chartered savings institutions had been prohibited from redlining by a regulation had gone into effect on January. Cincotta and her group had met with S&L regulators on several occasions before adoption of the new regulations, which

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industry opposition dissipated; major institutions said they could live with the ordinance See Harry Golden, Jr., "Aldermen Beef Up, Move Ahead Plan to Limit Redlining," Chicago Sun-Times, June 5, 1974. Also, "Anti-Redlining Law Moves to City Council," Austin Journal, June 12, 1974.

[30] HTIC, Disclosure, no. 6 (March 1975):5-6

[31] James Campbell, "Walker Plans Probe of Redlining," Chicago Sun-Times, April 29, 1974. Also, "Walker Appoints Panel to Investigate Redlining," Chicago Tribune, May 3, 1974.

were the first in the U.S. to define redlining.[32]

The state legislature also got into the act by creating a 12-member Illinois Legislative Investigating Commission. The Commission, which heard testimony from Cincotta and others,[33] issued a 409-page report that called for annual disclosure of each institutions' savings and mortgage activity (including figures for their primary service area), five-year reviews of performance, public hearings about the relocation of facilities (which would give consumer groups opportunities to testify) and public hearings on redlining complaints.[34] The ultimate result of these dual efforts were two[35] bills requiring disclosure and barring geographic discrimination.

III. Reformers' Battle Shifts to Washington; Lawmakers Help Expand The Issue to the National Scene

Even before their successes in Chicago and Illinois, NPA had focused its sights on Washington. Their eventual success at the municipal and state levels would provide much needed leverage and legitimacy for their ultimate goal of a national disclosure law.

Cincotta and her colleagues were familiar with Washington and its workings.

She had already appeared before four Congressional hearings. The first two occurred just after the creation of NPA. In testimony before Senator Philip Hart's Subcommittee on Antitrust and Monopoly, Cincotta had first raised the issue of redlining and voiced their frequently made claim that the enemy was "the real estate companies, the insurance companies, the savings loans and banks and the big powers. And to our amazement, it was the Federal Government, the FHA and HUD that is destroying our communities."[36], She would repeat the collusion claim later in the same week in a hearing on FHA defaults[37].

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[32] "New S. and L. Rule Bars Redlining on Mortgage Loans," Journal, January, 23, 1974.

[33] Linda Wertsch, "Report Official of S&L Admits Red-Lining," Chicago Daily News, July 25, 1974. See also Martin Fischer, "Local Groups Demand Disclosure at Hearing," Journal, July 31, 1974

[34] Albert Jedlicka, "State Asks S&L, Bank Rules to Curb Redlining," Chicago Daily News, February 7, 1975, pp. 17-18.

[35] Illinois already had a policy, dating from the tenure of State Treasurer Adlai Stevenson III in the mid-1960s, to allocate deposits of state funds to banks according to their record in making "social investments" -- loans for housing rehabilitation, minority businesses, and businesses in high unemployment areas. See Roger Neville Williams, "People's Banks," New Republic 175 (December 4, 1976):19. See Ed Manus, "Backers Mildly Optimistic for Laws Curbing Redlining," Chicago Tribune, May 4, 1975; James Eisener, "2 Bills to Save Homes Approved by House Unit," Chicago Tribune, June 14, 1975; Chris Mount, "New Redlining Proposals Hailed," Chicago Tribune, June 19, 1975, p. 2-7; John Camper, "Senate Passes Tough Red-lining Curbs," Chicago Daily News, June 25, 1975; "Walker Sings Two Anti-Redlining Bills," Austinite, September 3, 1975

[36] Senate Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary, Competition in Real Estate and Mortgage Lending, 92nd Cong., 2nd Sess., pt.2A (May 1, 1972), 4-8.

[37] House Subcommittee of the Committee on Government Operations, Defaults on FHA-Insured Mortgages, 92nd Cong., 2nd Sess., pt. 2 (May 4, 1972, 571.

The following year, Cincotta gave testimony at hearings on HUD oversight[38], and one on the problems of the "credit crunch," in which she repeated her call for full mandatory disclosure.[39] She also lobbied HUD at both the regional and national levels, and had met frequently with the Bank Board.

NPA had learned how to work Capitol Hill, identifying legislators' staff members who were sympathetic to the cause. On one such visit, in Spring 1974, just prior to the announcement of the national drive for disclosure, Cincotta and others met with Ken McLean, a staffer for Wisconsin Senator William Proxmire.

McLean had grown up on the southwest side of Chicago and understood the neighborhood's problems. The group had met several times before with the aide, who had discussed the problems of neighborhood decay with Proxmire. On that visit, McLean arranged for Cincotta and her group to visit with the Senator.

"We were in his office--he was one of many lawmakers we had visited that day. He was especially interested in our concerns, and was familiar with the progress of our Milwaukee affiliate in fighting redlining in his home state," Cincotta later recalled. "He said that if we wrote a bill calling for disclosure, similar to what we had proposed in Chicago, he would introduce it."[40]

Proxmire, then a fourth-term Democrat from Wisconsin, was an exceptional ally. He was sympathetic to consumer issues and to housing and had been instrumental in passage of truth-in-lending legislation. In 1973, following Nixon's slashing of housing programs, Proxmire introduced legislation to reinstate HUD and Farmers Home Administration programs.

Proxmire's involvement was also fortuitous. As the second-ranking Democrat on the Senate Banking Committee, he was in line to become chairman in the event that Chairman John Sparkman moved to the more prestigious Appropriations Committee -- which is exactly what occurred the following January.[41]

Proxmire, a former journalist and publishing executive, also

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[38] Senate Subcommittee on Housing and Urban Affairs of the Committee on Banking, Housing and Urban Affairs, Oversight on Housing and Urban Development Programs, Chicago, Illinois, 93rd Cong. 1st Sess., (March 30, 1973), 26-33.

[39] House Committee on Banking and Currency, The Credit Crunch and Reform of Financial Institutions, 93rd Cong., 1st Sess, pt 2, (September 17, 1973), 588-590.

[40] Gale Cincotta personal interview. Cincotta explains that NPA's leadership returned to Chicago and wrote the first draft of what was originally called the Financial Institutions Fair Reporting Act on the gymnasium floor of St. Sylvester's Hall in Northwest Chicago in the late night hour of a workshop being held for Catholic community workers. "We laid giant scratch pads out on the floor and hammered out something we thought everyone could live with," she explained. They sent their draft to McLean.

[41] The national banking lobby was so concerned about Proxmire's possible chairmanship during the 1974 elections that the bankers contributed generously to J. William Fulbright's re-election in Arkansas, simply to avoid a string of committee changes that would make Proxmire committee chair. As one political biographer notes, "Many bankers felt they were in for a reign of hostility." See Alan Elrenholt (ed.), Politics in America: The 100th Congress (Washington, D.C.: Congressional Quarterly, Inc., 1987), 1631.

was adroit in capturing media attention. His monthly "Golden Fleece" awards spotlighted examples of governmental waste and inefficiency and regularly captured press attention. His shrewd media relations would prove helpful in advancing the cause.

Upon Proxmire's ascent to the chairmanship of the Banking Committee, McLean became committee staff director and hired several investigators. Bob Kuttner, a journalist by training and a self-professed "progressive type," was given the project and served as the principal liaison with NPA and its affiliates. He would orchestrate testimony on the bill and help publicize the cause.[42]

Redlining Bursts on the Washington Agenda, Spring 1975

Proxmire's bill was read for the first time on the floor of the Senate on March 21. In his remarks, he cited specifically the work of Cincotta and HTIC in Chicago.[43]

Proxmire vigorously worked the bill by scheduling four days of hearings in early May; the proceedings would eventually fill 1,633 pages. In a well-orchestrated publicity campaign, Proxmire and his staff reached out to media to promote the legislation.

The first publicity in the Washington Post appeared in the Saturday real estate section ten days prior to the hearing. The author was a reporter for a leading industry newsletter:

> While citizens groups are mobilizing support for the measure, the banking industry and its regulatory bodies are less enthusiastic.
>
> Proxmire is pushing the legislation as a painless, all-American way to provide citizens with information they need to make informed judgments about their banks' lending performance. In a Senate speech, he said that the measure would allow citizens to "exercise their sizeable consumers' power to reward institutions that rewarded them"[44]

Proxmire's media savvy was evident when, on the Sunday prior to the hearings, the Washington Post ran a page-one story on the results of a Library of Congress study on the local lending practices of the District's 17 savings and loans. The paper noted "The study was released by Sen. William Proxmire (D-Wis.), chairman of the Senate Banking and Housing Committee." The Post went on to quote Proxmire extensively, even though the study was local in nature:

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[42] Bob Kuttner interview with author December 1991.

[43] 94th Cong. 1st Sess., Congressional Record 121, 8138.

[44] Barry Zigas, "Proxmire Bill Would Require Lenders to Open Their Books on Mortgages," Washington Post, April 26, 1975, p. E14. Concurrent with the hearings, Zigas noted that the District of Columbia City Council had scheduled hearings on the issue for the following Friday and that the District of Columbia Public Interest Research Group (PIRG) was mounting a local campaign against alleged redlining.

> The study shows, Proxmire said, a clear pattern of redlining by mortgage lenders. Redlining is the failure of lenders to make mortgage loans in particular neighborhoods," a practice he said results in "perfectly sound neighborhoods in every major city in America dying premature deaths for a lack of mortgage credit."

The Post later observed:

> Proxmire and other critics of the S&L industry argue that this pattern not only is illegal under federal civil rights laws, but violated the whole purpose for which the S&Ls were created--to enable working people to pool their resources through savings and then obtain loans to buy homes in their own communities.
>
> Anti-redlining groups have been formed in cities throughout the country to oppose what they see as a pattern of the lending institutions writing off whole neighborhoods because the houses are old or the residents are black and considered poor loan risks.
>
> Representatives of several of these groups are expected to testify at public hearings before Proxmire's committee that begin Monday on a bill that would attempt to discourage redlining by requiring S&Ls to disclose where they get their deposits from and where they make their loans.
>
> In Proxmire's view, citizens who see that their neighborhood S&L has written off their own community and is putting its money in the suburbs will create their own enforcement system by depositing their savings in more responsive institutions.[45]

The hearings proceeded on an orderly fashion. First among the witnesses were Illinois Governor Dan Walker and Cincotta. The Governor's presence added credence to the claims made by the activists that action was needed.

In her oral testimony, Cincotta melded her role as a grassroots activist with her credentials as an experienced testifier to argue "this destructive practice of mortgage financing has caused irreparable damage to the existing housing stock of our major metropolitan areas." Her principal testimony recounted many of the same points she had made previously in her lobbying efforts in Chicago and Illinois. Using charts in the hearing room and 118 pages of tables, charts and figures analyzing savings and conventional and FHA lending trends in various zip codes around metropolitan Chicago -- some over a 25-year period -- she demonstrated disparate lending trends.

Cincotta concluded her analysis by passionately stating:

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[45] Thomas W. Lippman, "D.C. Suburbs Got 90% of S&L Loans," Washington Post, May 4, 1974, p. A1+.

> The redline is there because the bankers made a decision that they would no longer make conventional loans in my community. The only effective way the neighborhoods, the cities, and Congress can deal with this redlining crisis is full mandatory national disclosure, so that every case like [an example cited] can be exposed and the pattern of redlining documented.[46]

Attacking the FHLBB chairman, she later noted:

> Mr. Bomar has testified several times before Congress in favor of variable rate mortgages without any data to substantiate his claims. We are before you today with limited but accurate data which clearly illustrates the need for mandatory disclosure.
>
> Lending institutions have this data. They know where their investments are. Why shouldn't the people and the Congress have this data?[47]

Following Cincotta, representatives of eight other community groups from around the country, arranged by Cincotta and Kuttner, and bombarded lawmakers with an additional 220 pages of studies.[48]

Walker and Cincotta's testimony were not reported by the Washington Post nor the Wall Street Journal. The New York Times described Cincotta's testimony this way:

> Gale Cincotta, a Chicago housewife, told the committee: "We can no longer afford to destroy the communities our parents have built. We need to preserve our communities for our children and our children's children.
>
> Mrs. Cincotta, a resident of Chicago's working class Austin section, is the head of National People's Action on Housing, an umbrella group for community housing groups across the nation.
>
> She cited a case where two University of Illinois professors with a joint income of $40,000 a year sought to buy a house near hers and were refused a conventional mortgage.
>
> "Why the redline?" she said. "Because the community is old? My house is 35 years old. If they couldn't get a conventional loan, what about the rest of my neighbors?

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[46] Senate Banking Committee Hearings, 170.

[47] Senate Banking Committee Hearings, 170-71.

[48] Speakers were: Theodore Snyder, Alliance of Concerned Citizens, Milwaukee; Alice Chase, president, People Acting Through Community Effort, Providence; William O'Grady, Coalition of Neighborhoods, Cincinnati; Ann M. Hanlon, Coalition to End Neighborhood Deterioration, Indianapolis; Monsignor Geno Baroni, president, Center for Urban Ethnic Affairs, Washington, D.C.; Paul Bloyd, Oak Park Community Organization and Chicago Metropolitan Housing Alliance; Frances Matarrese, East Oakland Housing Committee; and Edwina Cloherty, Jamaica Plain Community Council, Boston.

> "The saver as consumer has a right to know how his or her deposits are being reinvested," Mrs. Cincotta said. "We're not looking for handouts. All we are asking for is a fair return on our savings into our communities."[49]

The Chicago Tribune and Sun-Times devoted sizeable articles to the testimony, focusing on Walker's appearance, but mentioning Cincotta. Referring to the then-pending legislation in Illinois, Walker argued:

> The question is ... is an institution which is given a near monopoly with its charter serving the community? Let the people know where the banks are lending their money. Then let them decide if they want to put their savings there."[50]

Wednesday's appearance by federal regulators and lenders drew local press attention to the conflict. On Thursday, May 8, the Post's business section reported that representatives of lending groups voiced "vigorous objection" and told the committee "the bill is unnecessary and economically unsound, would put the information into the hands of 'pressure groups' and would be costly...."

Ironically, the two major banking executives who testified were from Chicago, where the redlining issue had first festered. Grover J. Hansen, president of First Federal Savings and Loan Association of Chicago, called the plan unworkable and unnecessary because there was still no proof that redlining existed. Underscoring the power that the activists had exhibited, he said that the bill would led to "private enforcement of public policy by special interest pressure groups."

John Perkins, president of Continental Illinois National Bank, said "... surely the Congress would not desire that sound lending policy be abandoned in favor of an equal dispersion of mortgage loans in each area of a given city so as to avoid any appearance of unfair discrimination on the basis of property allocation." Commented the Post reporter:

> This is just the point that supporters of the measure, including Proxmire, are attacking. They say that the lenders' notion of 'sound lending policy' is based on unsubstantiated belief that certain neighborhoods or certain classes of people are not good credit risks and write them off when there is no sound reason for it.[51]

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[49] William E. Farrell, "Homeowners Back 'Redlining' Curb," New York Times, May 6, 1975.

[50] Arthur Siddon, "Walker Urges U.S. Probe of Redlining," Chicago Tribune, May 6, 1975. See also Tom Littlewood, "Walker in D.C.: Redlining is Hit; Welcome is Rare," Chicago Sun-Times, May 6, 1975, p. 3; Stanley Ziemba, "MAHA Charge: 2 Loop Banks Deny Redlining," Chicago Tribune, May 6, 1975.

[51] Thomas W. Lippman, "Disclosure Bill Hit by Lenders," Washington Post, May 8, 1975, p. C1. See also, "Tom Littlewood, "Home-loan Chief Sees Redline Data Folding S&Ls," Chicago Sun-Times, May 8, 1975; "S&L Chief Warns of Loan Disclosure Boomerang," Chicago Tribune, May 9, 1975; Roberto Suro, "Redlining Doesn't Exist: S&L Chief," Chicago Sun-

On Friday, May 9, the Post took an editorial position. Recalling a past slogan used by lenders, "Invest in Your Community," the Post observed, "The evidence unfolding before the Senate Banking Committee this week suggests rather strongly that it is not true any longer if the community happens to be located near an urban center." The Post continued:

> Although spokesmen for the lending institutions vigorously deny it is true, the weight of the evidence seems to be against them. Representatives of 20 cities have told the committee of situations not substantially different from the one in Washington reported last Sunday in this newspaper. ...

The Post added later:

> The legislation under consideration by the committee is designed to discourage "red-lining" by requiring major lenders to disclose the geographic patterns of their depositors and their loans. The banking industry is opposing the bill on the grounds that "red-lining" does not exist, and if it did, this would not be a fair or effective way of stopping it. These grounds seem to us to be weak. If "red-lining" does not exist, the information required by the legislation would merely uphold the argument of the banking industry, although the kinds of data required by the proposal might need to be altered in order to make interpretation easier. If "red-lining" does exist, we see nothing unfair in letting depositors know where their money is being invested. You might call that "truth in savings."[52]

Editorial support for the anti-redlining legislation was augmented on the following Monday by a blistering commentary by liberal syndicated columnist Nicholas von Hoffman, which appeared in the Post's feature section. The opening salvo:

> It was the banking industry's time to have its say, and, per custom, the representatives displayed an admirable spirit of not rising to the occasion, of obtuseness, and thorough-going negativism. There they sat in the Senate Committee hearing room, the gentlemen from the American Bankers Association and the U.S. League of Savings Associations, unable to think of anything constructive while outside in America their members were giving away toasters, devising cunning leaseback deals and generally showing that when a banker who really wants to be creative can sometimes come up with a new idea.

Times, May 9, 1975.

[52] "Truth in Savings," Washington Post (editorial), May 9, 1975, p. 28. The major Chicago papers also editorialized on the issue on the same day: see "Get Tough on Red-lining," Chicago Daily News, May 9, 1975, p. 12; and "Raising Redlining Scare," Chicago Sun-Times, May 9, 1975, p. 57.

Terming the legislation "a timid piece of work that would do no more than require banks and savings and loan associations to publish statistics showing what communities their depositors live in compared to what communities the banks loan in," von Hoffman continued to broil the bankers:

> From the reaction of the bankers sitting at the long table looking at Prox, who was in a courtly, civilized mood, you'd think they'd just been held up. "We are not social welfare agencies," said William O'Connell of the Savings Association League, as if such a case of mistaken identity were likely. "Once you begin to disclose you open the door for some groups to come and pound on the table," one of the bankers protested. "We should be reminded that there is such a thing as social decay ... this is going to put us right in the middle of a racial conflict."
>
> The arguments were many, wondrous, contradictory, and, most of all, revealing of the thinking of the institutions which advanced them: "This could cause bank runs," although nobody explained how or why; lending money in credit-starved neighborhoods will "accelerate the process of neighborhood change," or "We don't lend money in those kinds of neighborhoods because everybody pays cash and there's no demand;" or best, of all, "You're asking us to put ourselves into a position where we will be social-pressured into making unsound loans."

von Hoffman proceeded to lambast the bankers for "a multi-billion dollar dunking by lending to real estate investment trusts" and for losing "sizeable wads gambling on the international currency markets." He concluded, "Had they kept their money at home and lent it on safe and stable collateral like houses in the communities where their own depositors reside, they'd be in far better shape than they are now."[53]

While the von Hoffman commentary was not without bias, it summed up what many in Washington felt: the community groups had scored a impressive win.

von Hoffman's commentary culminated a week of high visibility for the issue, but was not the end of what turned out to a monthlong press fight that focused mainly on the local dispute. However, Proxmire and his staff utilized these opportunities to keep the issue visible.

In a May 18 letter to the editor published in the Post, John Raymond, president of Home Federal Savings and Loan Association, wrote to contest four fallacies in the Library of Congress study. His introduction summed up the media scene:

All of a sudden it has become fashionable to castigate savings

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[53] Nicholas von Hoffman, "Hemming, Hawing and Redlining," Washington Post, May 12, 1975, p. B1. The syndicated column ran in numerous newspapers, including the Chicago Tribune on May 13, 1975.

> and loan associations for allegedly "red-lining" certain urban areas. Would-be political heavies turned TV commentators, editorial writers, Capitol Hill headline seekers, and others are all jumping on this poorly constructed wagon.

He concluded:

> As to the slogan "Invest in Your Community," we may already be overloaned in a number of areas, considering the minimum amounts of savings provided by residents of those areas. Senator's Proxmire's proposal would be a guarantee against further lending in the very places where the funds are most needed. Before you beat this dead horse any further, why not look at the facts?[54]

Proxmire lashed back with a response, which was published as a letter to the editor on June 6. He attacked the statistics for Home Federal, which had been used by Raymond to disprove the local allegations of redlining. Proxmire used this opportunity to further plead the case for his legislation:

> I continue to believe that if savers know which institutions are doing a good job of serving the community, they will tend to put their money in the community-minded institutions. The institutions generally will become more community-oriented, and we will all be better off. There is nothing in my bill that requires a lender ever to make an unsound loan.[55]

The issue would resurface a week later, when a banking reporter covering the meeting of the Metropolitan Washington Savings and Loan League reported that attendees staunchly defended themselves against redlining charges.[56] Then, on June 1, the Post published its own survey in the Sunday business section:

> Most Washington area savings and loan institutions historically have made mortgage loans for homes in neighborhoods throughout the city and its suburbs in rough proportion to savings deposits generated from the same neighborhoods.
>
> That is the conclusion of a Washington Post survey last week of most of the largest S&Ls in the area. ...
>
> While there are exceptions, the S&L figures would appear to contradict conclusions reached in research presented recently to the D.C. City Council and Senate Banking and Housing Committee--which point out that most mortgages in 1973 were for suburban homes.[57]

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[54] John U. Raymond, "Defending Savings and Loan Policies," Washington Post (letter to the editor), May 18, 1975, p. C7.

[55] William Proxmire, "Redlining," Washington Post (letter to the editor), June 6, 1975, p. A11.

[56] Nancy L. Ross, "D.C. Savings-Loan Policies Defended in Industry Talks," Washington Post, May 25, 1975, p. B7.

[57] William H. Jones, "S&Ls Match Neighborhood Deposits," Washington Post, June 1, 1975, p. G1.

Proxmire rebounded again with a letter to the editor on June 15 that attacked the article as "rallying to the defense of D.C. savings and loan associations" and calling the article "misleading in the extreme ... Clearly, one reason why there is such a low homeownership ratio in D.C. is precisely because of red-lining. You have the cause and effect out of order."[58]

IV. Onto the Policy Agenda: The Congressional Battle Begins

Intense Lobbying Efforts

Following their testimony, NPA publicized widely their victory in Washington in Disclosure. The cover prominently showed the leadership testifying with the blaring headline, "From the Streets to the Halls of Congress." Subsequent issues also informed followers of the progress of the legislation, and other milestone events, such as the influential endorsement of the U.S. Conference of Mayors the following month. NPA also used Disclosure to spur political action by its members as critical votes approached.

Cincotta and others also took their redlining outside through publicity,[59] and speeches before community organizations[60] and seniors groups.[61] She, Mayor Daley and others also testified in Chicago at a Senate subcommittee hearing, held by Senator Proxmire at the request of Illinois Senator Adlai Stevenson, to explore the problem of "fast foreclosure" and mismanagement at the FHA.[62]

Besides its own affiliates, NPA and Proxmire's staff aggressively sought out endorsements from other groups, who were influential in bringing pressure on Congressmen. These included the U.S. Conference of Mayors, the AFL-CIO, leading civil rights organizations, the Ralph Nader organization, and the Consumer Federation of America. The civil rights groups, in particular, supported the measure because the fight was against lenders and "they saw the virtue of having a non-racial framing of the problem."[63] Similarly, labor and the consumer groups were influential in raising the issue with Senators from outside of the 10 or 15 states where redlining was not perceived as an issue.

Also a critical element was building visibility about

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[58] William Proxmire, "Savings and Loans: City vs. Suburb," Washington Post, June 15, 1975, p. C7.

[59] Mark Starr, "To Fight 'Redlining,' Citizens Groups Turn, Yes, to 'Greenlining," Wall Street Journal, August 25, 1975, p. 1,19.

[60] Martin Fischer, "Cincotta, DeVise Battle Over Redlining Practices," News Journal, July 23-24, 1975.

[61] Joel Schatz, "Fight Redlining Seniors Urged," Sunday Star, August 17, 1975.

[62] See Martin Fisher, "Cincotta Testifies to Failures of FHA," The News, July 16, 1975. Also, HTIC, Disclosure, no. 10 (August 1975):1-2.

[63] Bob Kuttner interview.

redlining at the local issue among local and state lawmakers. Throughout the process, Cincotta and others gave testimony on state and local issues, such as that pending in Illinois as the hearings began. Although other states had "jawboned" lenders about the problem,[64] only Massachusetts had proposed similar disclosures at the regulatory level.[65] A significant move took place in August, when California regulators announced plans to crack down on redlining through disclosure based on census tracts.[66] Similarly, Ralph Nader's D.C. Public Interest Research Group had made a proposal to the District of Columbia Council based on rewarding urban lenders through city tax reductions.[67]

Senate Deliberations Begin

The momentum was building.

With fierce lobbying on both sides, HMDA proceeded through the legislative process.[68] Upon the conclusion of the hearings, the Senate Banking Committee began bill mark up on May 22. The 8-5 vote to approve was largely along party lines.[69]

The impact of community advocates was reflected in the committee report prepared for the full Senate:

> During the course of four days of hearings, the Committee received well documented testimony from neighborhood groups through the country, representing the communities that typically suffer.[70]
> ...

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[64] One example is Wisconsin Governor Patrick J. Lucey. See "Greenlining of America," 73.

[65] For a discussion of the Massachusetts proposal, which was the subject of litigation by bankers, see Robert M. Bleiberg, "Thin 'Redline,'" Barron's 55 (June 23, 1975):7; and Patricia Jordan, "Mass. Thrifts Planning Suit Over Redlining; Commissioner Stands Firm," American Banker, June 12, 1975. The regulation set off a controversy later when the regional office of the Comptroller of the Currency advised national banks that complying with the state's request was not in the public interest. See "FN Boston, Shawmut Agree to Request for Redlining Data," American Banker, September 2, 1975.

[66] California state-chartered savings and loans had been required for a decade to file reports which listed home loans by census tract, but the data was not open to the public. The California experience showed that census tract tracking was possible. See Ron Cooper, "California to Crack Down on 'Redlining' with Tough Rules for Mortgage Lenders," Wall Street Journal, August 26, 1975, 10. See also, "Major Coast Concern Will Back Home Loans for 'Redlined' Areas," New York Times, July 27, 1975; "On Redlining," The Nation, September 20, 1975, 228-229; "California Proposes Goldfish-bowl Rules to Half S&L Redlining," Housing & Home 48 (October 1975):16.

[67] HTIC, "D.C. Investment Plan," Disclosure, no. 10 (August 1975):9.

[68] The Wall Street Journal reported that, "Banks and savings and loan association conducted a heavy letter-writing campaign against the bill, complaining it would require costly bookkeeping and possibly subject them to local pressures to make risky loans. Big-city mayors, the AFL-CIO and civil rights groups pressed hard for the bill." See "Bill to Require Disclosing Neighborhoods that Get Mortgage Loans Clears Senate," Wall Street Journal, September 5, 1975.

[69] "Bill Requiring Mortgage Lenders to List Areas that Gets Loans Clears Senate Unit," Wall Street Journal. May 23, 1975, p. 2; "Senate Unit OKs Antiredline Bill," Chicago Tribune, May 23, 1975.

[70] Senate Committee on Banking, Housing and Urban Affairs, "Home Mortgage Disclosure Act of 1975," Committee Report 94-187, 94th Cong., 1st Sess. (June 6, 1975), 4.

> Committee witnesses presented impressive evidence documenting the degree of disinvestment in such communities. In most cases, neighborhood groups have developed the data by tabulating property records, one by one, available from the local recorder of deeds. The raw statistics were then sorted by lender and neighborhood, an extremely time-consuming process. More sophisticated computerized studies using census-tract mapping were conducted by the Baltimore city Housing Department, the Center for New Corporate Priorities in Los Angeles, the Phoenix Fund for St. Louis, the National Urban League in Bronx, New York....[71]

The majority pointed to the experience in Massachusetts, California, Illinois as examples of how disclosure was being implemented by the states. Reflecting Governor Walker's concerns, the report made special note of the fact that institutions under state jurisdiction might be at a competitive disadvantage to those regulated at the federal level if other states adopt a patchwork quilt approach to disclosure--a common legislative concern.[72]

The Republican minority, in its dissenting commentary, complained that "Most of the supporters of S.1281 who testified see it as tool to give community groups leverage over the financial institutions to achieve their ends."[73] They chided the hearings for being stacked in favor of the community groups, listed several urbanologists who should have been invited to testify, and raised industry-originated concerns related to the costs and complexity of compliance. Most significantly, they complained about the "misleading" data that had been originated by the Library of Congress in its D.C. Redlining Study, and used by Proxmire to fuel the issue. They responded with their own study using data obtained from the Metropolitan Washington Savings and Loan League.[74]

Upon Senate Banking Committee approval, the bill went to the Senate floor, where in an unusual Saturday session, Senators took up HMDA after related legislation, the appropriation for HUD.[75]

Not coincidentally, on the day before the debate began, Proxmire released the results of the 1974 survey conducted by the Comptroller of the Currency studying possible discrimination practices by national banks in six cities. The study showed that minority loans were rejected almost twice as often as white applicants in the same financial brackets. The story was covered in a small jump story on page one of Post. Proxmire argued, "except for this pilot survey, the agencies do not have any system for

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[71] Senate Banking Committee Report, 5.

[72] Senate Banking Committee Report, 13.

[73] Senate Banking Committee Report, 17.

[74] This was the same information cited in Raymond's letter to the Washington Post on May 25, but he made no reference to the data having been compiled at the request of the Senate Banking Committee Minority Staff.

[75] Congressional Record 121, 25154-55 and 25159-25168.

monitoring banks' compliance with the law. The entire burden is on the individual who thinks he may a been the victim of discrimination."[76] In the New York Times, he similarly attacked the Administration for not prosecuting a single case.[77]

The Senate debate lasted about an hour and was carried over the August recess. The bill was taken up again on September 4, in an exhausting afternoon session in which the Republicans systematically attempted to dismantle the bill through amendments. Senator Jake Garn, the former mayor of Salt Lake City who eventually became Banking Committee Chairman in the early 1980s, had led the primary Republican attack by introducing an amendment on June 28. The amendment, which was co-sponsored by Senator John Tower and others, limited the bill to a three-year demonstration project in only the 20 largest Standard Metropolitan Statistical Areas and using zip code coding instead of census tracts.[78]

Garn argued that the hearings failed to show that the problem was found in all 265 SMSAs and countered that the proponents had failed to show that the legislation as written would solve the problem of disinvestment. The Republicans also complained that the recording and reporting methods were not feasible nor justifiable.

During the rancorous debate than ensued, Republicans and Democrats squared off over minutiae related to implementation. During the debate, Garn inserted into the record text from the quarterly magazine of First Federal of Chicago, provided by industry lobbyists,[79] arguing::

> I shall not take the time to read it, but just offer it to show Senators an example of how these [figures] can be misused. Do not think that there are not groups who would misuse them to prove anything they want. The old statistical game, where you take the same figures and show in a different way how a total savings balance of $245 million and mortgages made of $5 million would show that savings dollars returned to the neighborhood are only 3.6 percent. You can take the same figures and show that the ratio of mortgages to savings gains are 118.6 percent--you get more than you put in.

In a similar vein, Garn attacked the group's evidence:

> Much of the so-called documentary evidence presented to the committee is of a questionable nature. Although community

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[76] Austin Scott, "Bias Found in Mortgage Rejections," Washington Post, July 25, 1975, p.1, 23.

[77] Linda Carlton, "2-to-1 Turndown of Minorities for Mortgage Loans Is Found," New York Times, July 26, 1975, p. 26. The announcement also was covered by CBS Morning News on its July 26 broadcast, p. 8. A month later, the Federal Home Loan Bank Board became the third agency to release its figures, which received comparable coverage. See "Rejection Rate on Home Loans Found Highest Among Blacks," New York Times, August 19, 1975, p. 67 and CBS Evening News, August 18, 1975, p. 9. In releasing its study, the Bank disparaged the validity of the results. See "Board Cites Caveat on Loan Bias Findings," Savings & Loan News 96 (October 1975), 24.

[78] Congressional Record 121, 27600-05, especially 27604.

[79] Congressional Record 121, 27608-9

> groups presented statistics which they claimed established the existence of redlining in Chicago, a survey by the Federal Home Loan Bank Board (cx) of Chicago showed that the city's savings and loans were making a significant amount of loans from June 1971 to June 1973 in areas claimed to be redlined.[80]

The Garn Amendment failed, 40-41, only a one-vote margin. After additional debate, including comments by Senator John Sparkman and Jesse Helms (R-NC), the legislation passed 45-37, with 18 members absent or not voting.[81]

House Deliberations Follow

Similar to the Senate, the House of Representatives, under Fernand St Germain, held extensive hearings.[82] The tone, however, was in sharp contrast to the antics of Senator Proxmire. In his opening remarks, St Germain, a staunch supporter of the bill, said:

> Now we turn to title III, which deals with the controversial issue of redlining. We all know that this issue has been with us for many, many years, and we feel that, as a result of what has been happening in our cities, together with the fact of redlining, I think we can all agree that the death of our cities is being accelerated by the lack of credit at reasonable terms. Accordingly, I would hope the oversimplified approach to the problem by use of such words as redlining can ... be abandoned, since it has served to polarize in a manner wherein the dialog to date has been increasingly destructive, rather than constructive.[83]

Cincotta and many of the same testifiers from the Senate hearings appeared before the House, including Governor Dan Walker. The main thrust of their testimony was the same, but slightly condensed form.

The House Banking Committee did not consider the legislation until October 3, when it passed 25-12. Four Republicans joined 12 Democrats in voting for the bill, while three Democrats and nine Republicans opposed it.[84]

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[80] Congressional Record 121, 27611.

[81] Congressional Record, 121, 27623.

[82] S. 1281 was originally introduced in the House as H.R. 8024, with several comparable versions also introduced, notably H.R. 6595 by Rep. Moakley. Later, Proxmire shrewdly would arrange for the bill to be attached as Title III to H.R. 10024, a piece of priority legislation that extended the flexible ceilings on deposit interest rates and extended a moratorium on electronic funds transfers. This move helped assure speedy House Consideration since the other matters were considered essential -- and veto-proof.

[83] House Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the Committee on Banking, Currency and Housing, Bank Failures/Regulatory Reform/Financial Privacy, Hearings on H.R. 8024. 94th Cong., 1st Sess. (June 26, 1975), 4.

[84] "Bill on Disclosure of 'Redlining' Data Clears House Panel," Wall Street Journal, October 18, 1975, p. 14.

Testimony from the House Banking Subcommittee, which ran 2,234 pages on all three titles of the legislation, was summarized in the House committee's report, along with previous testimony by FHLBB Chairman Bomar about the agency's reluctance to take action. The committee report concluded, "clearly the time has come for Congress to intercede by working cooperatively with the states in the development of a mortgage disclosure system that will bring to an end the confrontation tactics of the past decade." [85]

Many of the same arguments voiced in the Senate were repeated by House members in the Banking Committee's conference report and in the floor debate, which took place October 31.[86] St Germain was floor manager for the bill; his principal adversary was Republican John Rousselot of California.[87]

Rousselot attempted to kill the bill by offering an amendment that would strike the entire title from the three-part legislation in which it was considered. When that effort failed, 152-191, he introduced a series of nuisance amendments. Separately, Rep. Garry Brown, a Republican from Michigan, introduced an amendment similar to the Senate action that would limit the bill to only 20 SMSAs--a action that was barely failed to pass, on a 165-167 vote.[88]. Eventually, S.1281 passed the full House, 177-147.[89]

Passage Achieved

S. 1281 became law after a joint conference committee ironed out minor differences in the Senate and House versions.[90] President Ford signed the bill on December 31. The Presidential message reiterated many of the same counter-arguments that the bank lobby and Republican lawmakers had proffered as reasons to oppose the bill. Ford's staff-written message stated, in part:

> I am concerned that this Mortgage Disclosure Act may impose a burdensome and costly requirement for additional recordkeeping and paperwork. Unless this new disclosure program is very carefully administered, the Federal Government will be placing yet another requirement on the private sector--a requirement which will impose substantial costs but will do very little to

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[85] House Committee on Banking, Currency and Housing, Depository Institutions Amendments of 1975, Report to Accompany H.R. 10024., Rpt. 94-561, 94th Cong., 1st Sess., (October 10, 1975), 11.

[86] Congressional Record, 121, 34562.

[87] Rousselot's ties to the savings and loan industry were well-known. He would later serve a five-year term as president and chief staff officer of the National Council of Savings Institutions, the industry's second largest trade association. He would also be involved in an effort to purchase the failed Lincoln Savings and Loan in California.

[88] Congressional Record 121, 34574-5.

[89] Congressional Record 121, 34578.

[90] U.S. Congress, Home Mortgage Disclosure Act Conference Report on S. 1281., Rpt. 94-726, 94th Cong., 1st Sess. (December 15, 1975). For Senate concurrence, see Congressional Record 121, 40603. For House concurrence, see Congressional Record 121, 41708.

> increase the total availability of mortgage funds in our housing markets.
>
> I trust that the agencies administering Title III of this bill will assess carefully the costs and benefits to both the lenders and borrowers. As presently enacted, this legislation will have a 4-year life. If, within that period, undue burdens result from the implementation of this program, I shall not hesitate to recommend amending legislation.[91]

Passage went unnoted in the Post and Wall Street Journal, but the New York Times ran a UPI item upon agreement in the conference:

> Washington, Dec. 11 (UPI) -- Under a compromise bill agreed upon by the House and Conferees yesterday, citizens groups would be given a weapon for boycotting banks that refuse to make mortgage loans to home buyers in old neighborhoods.
>
> The bill would make Federally regulated banks and savings and loan institutions in metropolitan areas post lists showing in which areas they made mortgage loans.
>
> Neighborhood groups could then try to convince the banks' depositors to withdraw savings from the banks that discriminate against the areas they considered to be declining, a practice known as "redlining."[92]
>
> The community organizers had taken on the lenders and won.

The passage of the Home Mortgage Disclosure Act marked a significant milestone in the fight against mortgage discrimination. Since 1975, Congress has taken action three times to strengthen the HMDA's disclosure requirements, and the information that lenders are now required to make available to the public provides the principal ammunition used by community activists concerned with lending issues.[93] As late as 1991, lenders sought to dismantle HMDA's provisions, despite evidence that discrimination persisted.[94]

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[91] U.S. President, Public Papers of the Presidents of the United States: Gerald R. Ford (1976) National Archives and Records Service, (Washington, D.C.: Government Printing Office, 1979), 3.

[92] "Bill on Mortgage Listing Backed," New York Times, December 12, 1975, p. 67.

[93] The most significant of these was the Community Reinvestment Act of 1977, which was drafted by Proxmire's staffers to require lenders to delineate the markets they serve and to affirmatively make know the availability of their services. Regulators were to take an institution's performance into account when considering applications for new branches, new services or mergers and acquisitions. The Home Mortgage Disclosure Act itself was made permanent in 1980, and the scope of the reporting requirements were expanded. In 1989, the CRA was further strengthened to require regulators to rate institutions on their performance on 12 broad performance measures and to make these ratings public. HMDA's legacy has been to provide a vehicle through which more than 5,000 community groups now actively monitor lending performance.

[94] In October 1991, the Federal Reserve System released a study of 9,300 banks across the country that showed that the mortgage rejection rate for minorities far exceeded that for whites. See Paulette Thomas, "Mortgage Rejection Rate for Minorities is Quadruple that for Whites, Study Finds," Wall Street Journal, October 21, 1991, A1. Replications conducted by newspapers in major cities, using HMDA data, revealed similar local results. As examples, see Jack Norman, "Blacks Face Loan Disparity," Milwaukee Journal, October 25, 1991, A1,A6; and Mike Dorning and Michael Arndt, "Rich or Poor, Minorities Denied Loans More Than Whites," Chicago Tribune, October 22,1991, A1.

V. Agenda Building Through Claims-Making and Symbols

As a social movement, there is little question that NPA was the unifying force that raised the issue, captured the attention of lawmakers, documented the problem and mobilized considerable grassroots support. Yet, NPA's success was dependent on its ability to go beyond affected groups and to develop redlining as an issue that would capture the sympathy of additional supporters, politicians and the press.

Identifying and Documenting Redlining as an Issue. From a constructionist[95] perspective, redlining emerged as a social problem because it was defined as one by NPA and its affiliates. Redlining reflected their collective sentiments, rather than simply mirroring objective conditions in society.[96] Even NPA would admit that lenders no longer drew red lines on maps to delineate where they would not lend--if, indeed, they had ever done so. Yet, the concept provided a powerful metaphor for claims-making.

Redlining was typified by the community groups as a moral issue involving bankers, not an economic issue.[97] The bankers themselves acknowledged that it wasn't a lack of funds that prevented them from making loans in the disputed areas; they deliberately chose to make loans elsewhere because they felt the collateral was better or they could get a better return. [illegible]'s studies demonstrated that these effects were typical.

As is the case with most social problems, the anti-redliners drew upon a series of grounds, warrants and conclusions to make their case. Among their most powerful grounds was their definition of redlining itself, which they changed periodically to suit their needs.

Whereas "redlining" was originally conceived to mean the outright refusal to lend in certain areas, HTIC successively expanded its definition, prompting First Federal of Chicago to complain in its quarterly customer magazine:

> Not only does the data demand clarification, but the ground rules on what is and is not redlining have shifted a number of

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[95] See Joseph W. Schneider, "Social Problems Theory: The Constructionist View," American Review of Sociology 11 (1985):209-29. Also Joel Best, Images of Issues (Hawthorne, N.Y.: Aldine de Gruyter, 1989) and Herbert Blumer, Symbolic Interactionism (Berkeley: U. of California P, 1969); Stephen Hilgartner and Charles L. Bosk, "The Rise and Fall of Social Problems," American Journal of Sociology 94, 1 (July 1988):53; and Clarice N. Olsen, Philip J. Tichenor and George A. Donohue, "Media Coverage and Social Movements," in Charles T. Salmon (ed.), Information Campaigns: Balancing Social Values and Social Change, (Newbury Park, CA: Sage, 1989), 139-163.

[96] Hilgartner and Bosk, "The Rise and Fall of Social Problems," 53. Although some objectivist research had been done by academics on the economic realities of redlining, the passage of HMDA triggered a rash of economic and other studies that attempted to validate the contention. At least 20 studies were published in the years that followed, many contending there was no empirical evidence of redlining. As an example of one popularized version of a study, see George J. Benston, "The Persistent Myth of Redlining, Fortune 97 (March 13, 1978):66-69.

[97] Best, Images of Issues, xix-xxi.

> times. First, redlining was the refusal to make improvement loans. Then it became mortgage loans which were denied by neighborhood. More recently, the emphasis changed so that now redlining is the denying of conventional mortgage loans. Governor Walker's Commission on Mortgage Practices gave 11 definitions[98], and the notice of the hearing of Senator Proxmire's bill listed another, saying redlining was "more typically an insistence on higher down payment and shorter pay-back terms.[99]

Similarly, the NPA selectively redefined its definition of their principal goal (conclusion) -- the need for disclosure.[100] In defining the issue, NPA portrayed redlining in abstract (non-concrete) terms and attempted to overcome the complexity inherent in disinvestment, which was the real result of discriminatory lending. They also stressed its social significance and temporal relevance. The social significance theme was best summed up when Cincotta told the Wall Street Journal:"

> Redlining is one of your major causes of urban decline. ... There's a whole set of problems that start--like flight to the suburbs and crime in the streets--and they definitely start somewhere. I think they start with the institutions pulling money out of the neighborhoods.[101]

The temporal relevance of issue was developed largely through the theme of self-fulfilling prophecy: if action was not taken, the problem would only get worse and feed upon itself.[102] These

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[98] Senate Banking Committee Hearings, 35. Redlining included: 1) Requiring down payments of a higher amount than are usually required for financing comparable properties in other areas; 2) Fixing loan interest rates in amounts higher than those set for all or most other mortgages in other areas; 3) Fixing loan closing coasts in amounts higher than those set for all or most other mortgages in other areas; 4) Fixing loan maturities below the number of years to maturity set for all or most other mortgages in other areas; 5) Refusing to lend on properties above a prescribed maximum number of years of age; 6) Refusing to make loans in dollar amounts below a certain minimum figure, thus excluding many of the lower-priced properties often found in neighborhoods where redlining is practiced; 7) Refusing to lend on the basis of presumed "economic obsolescence" no matter what the condition of an older property might be; 8) Stalling on appraisals to discourage potential borrowers; 9) Setting appraisals in amounts below what market value actually should be, thus making home purchase transactions more difficult to accomplish; 10) Applying structural appraisal standards of a much more rigid nature than those applied for comparable properties in other areas; 11) Charging discount "points" as a way of discouraging financing.

[99] "Redlining: Our View of the Matter," cited in the Senate's floor debate by Senator Jake Garn, Congressional Record 121, 27609.

[100] HTIC's newsletter wrote, "Most of this newsletter has dealt with redlining. but that is not our only concern. Our housing crisis has many facets.... We hope to cover other issues in future editions, such as tenants' rights, senior housing, abandonment, absentee landlords, co-ops, rehabilitation programs, CDCs and continual review of FHA programs... We're called this newsletter Disclosure not only because its our major demand on redlining, but because it stands for our right to know on all these issues." See HTIC, "The Next Move," Disclosure, no. 2 (September 1974):12. Later, the definition was redefined in the newsletter as follows: "Disclosure is not only our demand in our redlining fight, disclosure is our decision to know the developer, the lending institution, and the governmental officials who are destroying our cities." See HTIC, "The Next Move: Gale Cincotta," Disclosure, no. 10 (August 1975):12.

[101] See Gale Cincotta quoted in Starr, "To Fight 'Redlining' Citizens Groups Turn to, Yes, 'Greenlining,'" 19.

[102] For examples, see Jean Caffey Lyles, "The Self-Fulfilling Prophecy of Red-lining," The Christian Century 91 (April 1974):355-57. Cincotta cites the self-fulfilling prophecy theme in Brown, "Critics Say Lenders Hasten Decay by Denying Mortgages," 1.

elements helped broaden the base of support.[103]

NPA and its allies also used examples as grounds. But instead of anecdotal evidence, NPA used studies based on extensive research. Their examples were whole cities -- power examples, many of which represented the home districts of the lawmakers.

NPA's use of extensive research might be is most distinguishing tactic. One New York Times writer summed up NPA's acumen this way:

> In contrast to the 1960s, when antipoverty funds led to numerous community action groups being able to obtain hasty concessions from city officials through sit-ins, the new groups tend to rely on carefully assembled facts to press their arguments.
>
> Groups opposed to redlining ... quote financial balance sheets showing that the lenders risked and lost much money on real estate trusts than they did on loans to poor or marginal applicants.[104]

Bankers would invariably challenge the data, says Cincotta. But statistics were more than merely a way to make claims. They represented another way to establish NPA's legitimacy.[105]

"These groups are really a new breed of cat," Carl Holman, president of the National Urban Coalition, told the Times. "They are effective because they use property owners, shopkeepers, and others in their coalition, and they do their homework."[106] The power of having facts was suggested at the Senate vote, where Proxmire told his aides that Cincotta and her group's studies were chiefly responsible for the Senate's favorable action.[107]

Symbol Utilization. While NPA used studies extensively, they did not win the battle on numbers alone. Indeed, specific city statistics were inconsequential in making the argument in Congress, and of interest only to affected groups only when published in local newspapers. The battle was principally won using symbols.[108]

Edelman stresses the importance of symbols in politics, noting

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[103] Cobb and Elder, Participation in American Politics, 112-124.

[104] Holsendolph, "Neighborhoods Turn to Self-Help for Preserving and Improving."

[105] Gale Cincotta interview.

[106] Holsendolph, "Neighborhoods Turn to Self-Help for Preserving and Improving."

[107] Bill Neilark, "Senate Passes Bill to Halt Redlining," Chicago Tribune, September 5, 1975, p. I-3. See also Williams, "People's Banks," 18. The Senator made similar comments when asked by the author in preparation of this paper.

[108] Housing issues have been replete with rhetoric and symbols for decades. See Michael A. Quinn, "Much Sound and Little Fury: The Place of Rhetoric in the Politics of Housing," Chapter 3 in Robert E. Mendelsohn and Michael A. Quinn (eds.), The Politics of Housing in Older Urban Areas (New York: Praeger, 1976). See also Vernon E. Jordan Jr., "The Disinvestment in Urban Areas," Vital Speeches 42 (January 1, 1976):190-2.

that the public wants symbols -- not news[109] -- and that symbols involve people emotionally.[110] Cobb and Elder similarly suggest that the quicker an issue can be converted to a emotional issue, the quicker it will gain public visibility.[111] They state it is both possible and analytically useful to separate symbols from their meaning and that, within any particular time context, certain symbols will be salient to most people, provoke positive or negative reactions, and lead to expansion of involvement by persons not concerned with the initial definition of the dispute.[112]

Throughout the controversy, *redlining* and its spinoff concept, *greenlining*, were useful symbols themselves. Both were rich in imagery. However, these were essentially metaphorical devices. The deeper symbols found in the discourse included: *neighborhood, equality, people's right to know,* and *plain folks*.

From the outset, *neighborhood* was probably the most powerful symbol and served as the chief warrant why action was needed. Indeed, redlining was a neighborhood-based issue that was steeped in historical traditions and that conjured up a sense of a community of caring, interdependent people looking out for one another. Neighborhoods were worthy of preservation.

Equality played an equally significant role in the discourse, representing the democratic premise that individuals should have equal access and that credit was a community resource that should be shared, especially if the funds came from within a neighborhood. This was a matter of fairness that piggybacked on the heightened sense of equality that emanated from the civil rights movement.

People's Right to Know formed the basis of NPA's primary conclusion in the claims-making process: the only way the community would know whether redlining existed was through disclosure. This theme was repeated throughout the initiative to circumvent objections: All the bill did was to give the community (or Congress) the facts so they could decide for themselves.

The fourth and final symbol was *plain folks*. In keeping with its origins, NPA effectively positioned itself as made up of truly working class people; the group's very name underscored this emphasis. It could be argued that the sophistication with which NPA used data, contrasted to their appearance as ordinary citizens, proved especially persuasive. Cincotta expressed the importance of their approach this way:

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[109] Murray Edelman, The Symbolic Uses of Politics (Urbana: U. of Illinois Press, 1985):9.

[110] Edelman, The Symbolic Uses of Politics, 15.

[111] Cobb and Elder, Participation in American Politics, 124.

[112] Factors influencing symbols include their historic meaning, credibility, saturation, reinforcement by other symbols, and urgency. Symbols can arouse, provoke, provoke, dissuade, strengthen commitment or affirm by stressing unity and solidarity. See Cobb and Elder, Participation in American Politics, 142-150.

> Not knowing the rules -- and being really grassroots -- we came in as citizens. Maybe they [Congressmen] were tired of hearing from trade associations and groups in Washington. ... If you think of Congress never seeing real people and remember we were operating nationally, we came in as Hispanics, and blacks and whites. We weren't talking about overthrowing the government, but how we needed banks. We weren't asking to nationalize the banks. We said we needed them -- and their brains -- to stabilize our cities.[113]

Significantly, both the *neighborhood* and *equality* symbolism enabled the anti-redliners to create *enemies* and characterize themselves as *victims*, which themselves are powerful symbols.[114] Interestingly, although NPA fiercely attacked HUD and the Bank Board (which might be interpreted as an *inept bureaucrats* symbol), NPA never actively sought to invoke *greedy banker* symbolism, despite the fact that imagery is pervasive throughout society.[115]

The symbolism utilized by NPA in their argument is most insightful when contrasted to the responses of the banks, whose arguments were surprisingly short of symbolism, or at least positive symbols. Proxmire noted in his Senate speech, "I seldom have been a more panicky reaction by an industry to such a benign, simple, easy proposal."[116]

The lenders' principal counter-claims centered around *denial*, the *limited scope* of the problem in only urban areas (if it existed at all), the *cost, complexity* and *paperwork* related to compliance (especially for small and rural institutions), *data problems* related to validity and reliability, their preference for *zip code versus census tract* reporting, the specter of *credit allocation*, and opposition to *social engineering* that removed decision making from the lenders and forced them to make imprudent loans. The lenders simply never generated an argument that either Members of Congress or the public found compelling.

Two objectivist authors concerned with the economic reality of redlining summed up the effect as follows:

> In having their way in the halls of Congress and in many state legislatures, these upstart Davids with very meager resources have routed the Goliaths of a major industry. How that would happen is a major puzzle ... but one factor has clearly been their ability to place financial institutions on the ethical

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[113] Gale Cincotta interview.

[114] Cobb and Elder point to the symbolism invoked by victims and note that one of the most successful strategies is to create an "enemy." See Cobb and Elder, Participation in American Politics, 57.

[115] Cincotta later explained that NPA knew that the organization would need to be work closely with the banks to achieve their goals once disclosure was obtained. There was little to be gained by attacking the banks or antagonizing them further.

[116] Congressional Record 121, 25160.

defensive.[117]

Equally interesting is the close alignment between the pro and con arguments made by the combatants in their testimony and in the press,[118] compared to the debate on the Senate and House floors. To a large measure, Congressional representatives replayed the arguments almost verbatim, due to their dependence on the media as well as direct lobbying sources.

VI. Use of Media to Frame and Expand The Issue

Cobb and Elder suggest that in addition to symbols, groups use publicity in the public media to channel their demands beyond identification groups and attentive groups to the broader public.[119] In a similar vein, Molotch notes that mass movement and media need one another[120], while Olien, Tichenor and Donohue note that media do not possess independent, knowledge-generating sources and, as a whole, are dependent upon political institutions for definitions and for information about social problems.[121]

The manner in which NPA identified the issue and utilized symbols generally -- in its communications to affected homeowners, supporters, lawmakers and the media -- directly impacted the types of messages found in the press coverage on the redlining problem and in the coverage of HMDA in Washington. Yet, the strategies used in the early Chicago and the later Washington campaign provide a curious contrast.

NPA And Early Chicago Coverage

During her early Chicago organizing, Cincotta says she never sought publicity for its own sake. However, she and her colleagues quickly understood the important role that the media played -- a lesson she said she learned early in her career as a community activist, beginning with the PTA.

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[117] Guttenberg and Wachter, Redlining and Public Policy, 49-50.

[118] For a recap of lenders' arguments as they appeared in media during the period, see Kolbenschlag, "Guerrilla War Over Redlining...," 8-9; Hutchins, "Fuss Develops Over Redlining by S&Ls...," 24; Brown, "Critics Say Lenders Hasten Urban Decay by Denying Mortgages," 1,23; "The Law Closes in on Mortgage Discrimination," 143-44; "The Fight for Urban Reinvestment," 38-46; and Farrell, "Redlining by Lenders is Called Cause of Old Communities Decay," 20.

[119] Cobb and Elder, Participation in American Politics, 16.

[120] Harvey Molotch, "Media Movements," in M. Zald and J. McCarthy (eds.), The Dynamics of Social Movements (Cambridge, MA: Winthrop, 1979), 70.

[121] Olien, Tichenor and Donohue, "Media Coverage and Social Movements," 148. Although the authors do not specify so, formal social movement organizations such as NPA can be viewed as a "power institution" that serves as a source of information for media in the same way as Establishment institutions. For example, they note that mass media are relied on increasingly to let members know what is happening and that much of what the general public knows about social movements reaches them through printed pages and airwaves.

She recalls that as her local organizing activities drew the attention of community weeklies, she would keep them informed. "We regularly invited the press to events we had. And, they soon knew that if we said we were going to have a protest, we would pull it off."

Publicity was always secondary to extracting whatever concession that the group wanted from their opponent, although publicity stirred up support. As the group gained experience, however, cultivation of the media became more sophisticated and extensive. For example, the Chicago Tribune Index from 1972 to 1975 contains a total of 57 mentions of redlining; Cincotta was quoted a total of 22 times in that paper alone.[122]

Theorists argue that media coverage of social movements is largely concerned with maintenance of the status quo and social control (which variously are defined as damage control and conflict management).[123]

A nonexhaustive analysis, drawn heavily from available clippings obtained in NPA's archives, suggests that coverage during the early Chicago period portrayed NPA consistently within a *confrontational* package, framing the issue as a battle between the *plain folks* and the *rich and powerful*.[124] Almost without exception, this conflict frame applied, whether the group was fighting slumlords, mortgage bankers, or government officials. As is the case with much media coverage of social problems, little attention was paid to the underlying issues in any depth.

Generally, however, the coverage was sympathetic. The author found few cases of negative treatment of any of NPA's protests, including efforts to marginalize or trivialize the group.

The harshest treatment by the Chicago Tribune could be found on two successive days in which the newspaper reported on passage of the Illinois bills and the Senate's passage of the federal bill. In the first story, a Chicago-based reporter wrote:

> The tactics of her group and others like hers in the city, the Citizens Action Program coalition and the Southwest Parish and Neighborhood Federation, have been calculated to embarrass officials and gain publicity.
>
> They have included street protests outside savings

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[122] Since none of the other papers, including the important suburban weeklies, were indexed during this papers, comparisons are not possible within embarking on a full search.

[123] See Molotch, "Media and Movements." Also Olien, Tichenor and Donohue, "Media Coverage and Social Movements, 141 and 147; Edward Herman and Noam Chomsky, Manufacturing Consent: The Political Economy of Mass Media (New York: Pantheon, 1988).

[124] See William Gamson, "A Constructionist Approach to Mass Media and Public Opinion," Symbolic Interaction 11,2 (1988): 161-174. Also William Gamson and Andre Modigliani, "Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach," American Journal of Sociology 95, 1 (July 1989):1-37; and Todd Gitlin, The Whole World is Watching: Mass Media in the Making and Unmaking of the New Left (Berkeley: University of California Press, 1980), esp. pp 6-7.

> institutions, attempted proxy fights, visiting officials at home, and trapping institution and regulatory agency officials before hostile audiences in the presence of reporters and television cameras. And withdrawals, totalling millions of dollars from savings and loan associations accused of redlining is called a 'greenlining' tactic.
>
> Critics have called the tactics intimidation and some bankers consider greenlining a step from extortion.[125]

On the next day, a Washington bureau writer mildly referred to protests, while citing NPA's mainstream use of research:

> The group's tactics in seeking anti-redlining legislation have ranged from street protests outside Chicago savings institutions to making in-depth studies to prove the existence of and show the effects of redlining.[126]

Indeed, the only example of outright attack on the group came in a article in a housing trade publication, in which the president of First Federal of Chicago described Cincotta as a "self-proclaimed organizer" who did not represent a constituency. In the same article, the president of the Federal Home Loan Bank of Chicago described NPA as dangerous, adding, "These are professional radicals at work to take over allocation of credit as a power base. These are Saul Alinsky-radical protest groups."[127]

Two explanations are probable.

First, Cincotta effectively facilitated coverage, although she did not seek it out for its own sake -- by keeping the media informed, by being accessible, and by providing dependable newsworthy events. She also had a knack for providing glib, quotable quips that played off the symbolism of the movement -- a fact evident in both news coverage and in testimony transcripts.

In essence, Cincotta quickly learned what the press wanted and was able to routinize coverage.[128]

Second, and more important, NPA was involved in an issue that

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[125] Allan Merridew, "Fight Against Redlining Turns to Drive for Tough Federal Laws," Chicago Tribune, September 4, 1975.

[126] Bill Neilark, "Senate Passed Bill to Halt Redlining," Chicago Tribune, September 5, 1975.

[127] See Kolbenschlag, "Guerrilla War Over Redlining," 9. In fact, one affiliate of NPA, the Citizens Action Program, was a unit of Alinsky's Chicago-based Industrial Area Federation. The group was the primary advocate of "greenlining," a practice that Cincotta didn't support because she didn't think it would be effective and potentially could harm participants.

[128] Many social movement authors have pointed to the disadvantage that many social movements encounter because the media routinely depend on "establishment" organizations as sources of information and to legitimate the news. In the case of NPA's early Chicago activities, it could be argued that this advantage was diminished. Slumlords, real estate brokers, and mortgage bankers were small organizations that were not necessarily responsive nor authoritative sources. Similarly, the regional office of HUD, the FHLBB, and many individual lenders do appear to have been effective in responding to the group's demands. This might further explain NPA's success.

affected media consumers on a broad, albeit local, scale: neighborhood preservation. Not only did media consumers have a vested interest, but the community press organizations did as well. Molotch notes, "Media can be expected to respond negatively to any movement that threatens the surrounding economic base and to be sympathetic to those movements, on the relatively rare occasion when they exist, that are seen as enhancing the future of that economic base."[129].

HMDA Coverage in Washington

While NPA's tactics in Chicago combined high levels of conflict with a relatively low-key approach to publicity, these components were reversed when the issue was tackled in Washington. In the capital, a high-powered (and contrived) publicity campaign was combined with intensive, but routine lobbying.

Proxmire and his staff recognized that redlining simply did not have sufficient visibility to capture the serious attention of Congress. If they were to be successful, they needed to stir up awareness and interest. As Kuttner recalled, the story of a multi-racial neighborhood group going up against the rich and the powerful was "good copy."[130]

Olien, Tichenor and Donohue note that news media coverage tends to be greatest at periods of controversy and that coverage and intensity are interactive processes.[131] In that regard, Hilgartner and Bosk speak to the role of "feedback" in their model of public arenas, noting "those problems that gain widespread attention and grow into celebrities that can come to dominate not just one arena of public discourse but many."[132]

Proxmire and his staff masterfully raised visibility for the redlining issue timed to their needs. Such activity is not usual. In fact, it is common. Hilgartner and Bosk, in their model of public agendas, note that "Congressional aides ... routinely attempt to generate and shape media coverage of their employers activities."[133]

The press coverage of the redlining issue was surprisingly sympathetic in Washington, especially in the week of the Proxmire hearings. The first redlining study, the Post's editorial and Nicholas von Hoffman's commentary all portrayed the community groups sympathetically. In Washington, such treatment is

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[129] Molotch, "Media and Movements," 83.

[130] Bob Kuttner interview.

[131] Olien, Tichenor and Donohue, "Media Coverage and Social Movements," 141.

[132] Hilgartner and Bosk, "The Rise and Fall of Social Problems," 67.

[133] Hilgartner and Bosk, "The Rise and Fall of Social Problems," 67.

difficult to explain in terms of the media having a vested interest in a particular neighborhood or due to routinization of coverage. It can probably be understood better in the context of the *equality* and *plain folks* symbolism.

It is interesting to note that the later coverage, which appeared primarily in the business section of the Post, tended to be less sympathetic and more balanced in favor of the lenders' point of view. This included reporting that tended to trivialize and marginalize the issue in a way that was not evident in the early Chicago coverage. Here, some argument could be made that the press was serving as a "guard dog versus a watchdog"[134] or that hegemonic or institutional constraints affected coverage. Alternatively, it could be argued that the Post went out of its way to provide for balance, especially in light of their source of the information.

VII. Conclusion: Integration of Media, Systemic and Policy Agendas.

The political machinations that took place in during May and June 1975, underscored the peculiar interrelationship between the systemic and public policy agenda. In their general model, Cobb and Elder state:

> In general, it has been our contention that perhaps the surest way for an issue to attain and maintain [public] agenda standing is first through entry into the systemic agenda of controversy. While it is possible for an item to attain access to the formal agenda without having gained systemic agenda standing, it is unlikely that any issue of major social consequence will become a formal agenda item without prior standing on the systemic agenda.[135]

It could be argued that the experience of the redlining legislation is an anomaly to Cobb and Elder's model. While a sufficient case might be that redlining was already on the public agenda, it is fairly clear that there was no groundswell of public opinion clamoring for disclosure legislation. In fact, as is the case with much special interest legislation, access was brokered[136] through Proxmire.

By gaining access to Proxmire, the group was able to largely circumvent the normal process, which might have taken years for a true nationwide outcry for action on mortgage discrimination. The group was clearly positioning itself if such action were needed, witnessed by the succession of victories at the city and state levels. NPA understood the dynamics in building an issue into an

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[134] Olien, Tichenor and Donohue, "Media Coverage and Social Movements," 160.

[135] Cobb and Elder, Participation in American Politics, 161.

[136] Cobb and Elder, Participation in American Politics, 155-156.

agenda item. About the HMDA legislation, Cincotta later explained:

> This came out of going through steps -- and it still does -- of trying to resolve things locally, from the very local alderman to the state. ... It took all of that to get the problem resolved for the Westside and Southside of Chicago. It took each of those steps before we could get the results we wanted. It wasn't a whim.[137]

But it also was a matter of luck.

Tarrow suggests that the system frequently assists social movements in this process through "political opportunity structures."[138] The eagerness of politicians to appear at NPA's conference, the desire of Governor Dan Walker to be visible on the issue, Proxmire's ascent to the chairmanship of the Senate Banking Committee, and the ambition of staffers Ken McLean and Bob Kuttner's are examples of how the system creates opportunities for social movements to advance their causes, given the right timing.[139] As Kuttner noted, "All the pieces were in place for things to move, and it was "luck of the draw that gave them Proxmire as Banking Committee chairman."[140]

Cincotta and her group adroitly seized very political opportunity that presented itself. Cobb and Elder note that groups most often must go through a prolonged process of lining up support among a wide spectrum of attentive publics so that the level of concern is broad enough for decision makers to respond, even though they might merely consider the problem superficially.[141]

By winning approval of the Chicago ordinance, NPA could use the Chicago experience to win state support. Chicago also served as an example for other cities. The experience in Illinois, in turn, provided powerful evidence that national action was necessary. It was not coincidental that Governor Dan Walker was a

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[137] Gale Cincotta interview

[138] Sidney G.Tarrow, Struggle, Politics and Reform: Collective Action, Social Movements and Cycles of Protest (Ithaca, NY: Center for International Studies, Cornell University, 1989), 37.

[139] The timing of the HMDA legislation is a particularly interesting case in point. Tarrow suggests that reforms are most likely to occur in times of electoral instability, while Hilgartner and Bosk opine that changes in political culture affect the selection of issues by altering the acceptable range of public discourse. Proxmire chose to champion the cause during a period of comparative political and economic upheaval, which might explain why he was so successful in the first year the legislation was introduced. He was the new chair of the Senate Banking Committee. Gerald Ford had ascended to the Presidency in August 1974, without a clear mandate from the public. Inflation was rampant, New York City was on the verge of financial collapse, and the country had not yet begun coming out of the 1974-75 recession. A strong reform undercurrent permeated Washington in the aftermath of Watergate. In the September 1974 issue of Disclosure, Cincotta alluded to the disarray in Washington, writing "Now that the Congressional docket is clear of impeachment, our chances for full Congressional investigation are better." See HTIC, Disclosure, no. 2 (September 31, 1974):12.

[140] Bob Kuttner interview.

[141] Cobb and Elder, Participation in American Politics, 156.

major witness in both the Senate and House hearings.[142]

Despite their successive efforts, the key to NPA's ultimate success lay in Proxmire. Tarrow notes that "insurgent groups do best when they succeed in gaining support from among influential groups within the system."[143] Similarly, Cobb and Elder suggest that "access to one or more key officials is important to political groups,"[144] and that "predecisions play the most critical role in determining what issues are considered."[145]

Tarrow notes that social movements actually create opportunities for elites. This can be in a negative sense by creating opportunities for repression, or in a positive sense when opportunistic political groups are encouraged to proclaim themselves as defenders of the poor or tribunes of the people.[146] Although every indication is that Proxmire and his staff were legitimately concerned about the problems of discrimination, there is little question that NPA's call for disclosure presented an opportunity for Proxmire to flex his muscle in his new position.

The symbiotic, if not incestuous, relationship between the press and policy-makers in Washington has been well documented. Cater, for example, called the media "the fourth branch of government."[147] In the case of HMDA, the traditional view -- which underlies the Cobb and Elder model -- that the press helps set the agenda was clearly challenged. Instead, the order of events suggests that one lawmaker's political agenda set the media agenda.[148] Yet, it was unlikely that the issue could have survived without the press support under the circumstances.

The experience of National People's Action in seeking passage of HMDA has important implications for observers interested in social movements, the political process and media.

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[142] Cobb and Elder note "Government is inevitably involved in the social allocation of prestige and the social construction of reality. In giving an issue formal agenda status, government conveys important messages about who and what are socially important, about what is and is not problematic, and about what does and does not fall within the legitimate purview of government." See Cobb and Elder, Participation in American Politics, 172. In this sense, government endorsement is probably the highest form of social legitimation.

[143] Tarrow, Struggle, Politics and Reform, 88.

[144] Cobb and Elder, Participation in American Politics, 90.

[145] Cobb and Elder, Participation in American Politics, 12.

[146] Tarrow, Struggle, Politics and Reform, 36.

[147] Douglass Cater, The Fourth Branch of Government (Boston: Houghton Mifflin, 1959).

[148] For a further discussion of the inter-related nature of media, systemic and policy agendas, see Jarol B. Manheim, "A Model of Agenda Dynamics," Chapter 22 in Margaret L. Laughlin (ed.), Communication Yearbook 10. Newbury Park, CA: Sage Publications.

Although social movement organizers must be prepared to organize at the grassroots level, to tackle a very narrow and specific goal, to toil over an extended period of time to make a case and build a constituency, NPAs success suggests these efforts are not sufficient for success. Utilizing the media system is helpful, but tapping the political system is critical.

HMDA is a case of special interest legislation that managed to circumvent normal channels and become law without a groundswell of public opinion or support -- and certainly not from the perspective of the press as an institution that ferrets out problems and brings thems to the attention of the public or policy-makers.

Rather, Proxmire's manipulation of the media agenda is an insightful example of the press' agenda-setting function[149] reflecting -- not leading to public polciy agenda-setting. The passage of HMDa reflects the interwined relationship between the press and politicians -- and how the media can be used unwittingly by lawmakers to advance particular agendas, and thus convert particular social constructions in political realities.

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[148] See Maxwell E. McCombs and Donald L. Shaw (1972), "The agenda setting function of mass media," Public Opinion Quarterly 36, 176-284. Also Donald L. Shaw and Maxwell E. McCombs (eds.), (1977), The Emergence of American Political Issues: The Agenda-Setting Function of the Press. St. Paul: West Publishing. For a review of agenda-setting research, see Everett M. Rogers and James W. Dearing, "Agenda-Setting Research: Where Has It Been, Where is It Going," in James A. Anderson (ed.), Communication Yearbook 11. Newbury Park, CA: Sage.

Violations of Open Meetings Laws: Statutory Provisions and Courts' Enforcement

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Abstract

Every state has an open meetings or "sunshine" law. The purpose of such laws is to open governmental proceedings to public scrutiny, and, therefore, prevent corruption and eliminate the appearance of impropriety. Sunshine laws also attempt to promote people's involvement in public issues.

Likewise, virtually every state has provided the courts with some type of enforcement power, or legal remedy, to deter violations of the sunshine laws. However, there is no scholarly literature summarizing legal remedies in each state and discussing court interpretation of those remedies. Most research has concentrated on an overview of statutory law, emphasizing how much openness is required, or on specific sunshine issues in individual states.

The purpose of this study is to examine the penalty provisions of all the open meetings statutes, the number of times the laws have been enforced, and the remedies being used in the state appellate courts to enforce the laws.

Introduction

Every state has an open meetings or "sunshine" law.[1] The purpose of such laws is to open governmental proceedings to public scrutiny, and, therefore, prevent corruption and eliminate the appearance of impropriety. Sunshine laws also attempt to promote people's involvement in public issues that concern their communities and local government officials. In a country where the political system relies on an informed citizenry, sunshine laws ultimately exist because "PUBLIC BUSINESS is the public's business."[2]

Virtually every state legislature has provided the courts with some type of enforcement power, or legal remedy, to deter violations of the sunshine laws. However, there is no scholarly literature summarizing legal remedies in each state and discussing court interpretation of those remedies. Most research has concentrated on an overview of statutory law, emphasizing how much openness is required,[3] or on specific sunshine issues in

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[1]Open meetings laws are also known as access laws, open meetings acts, freedom of information acts, sunshine laws, and right to know laws. For the purposes of this study, they will be referred to as sunshine laws or open meeting laws.

[2]Cross, H.L., The People's Right to Know. (NY: Columbia University Press, 1953).

[3]See, "How State Open Meeting Laws Now Compare with Those of 1974." Sharon Hartin Iorio. Journalism Quarterly, (Vol. 62, No. 4, Winter 1985) 741.

individual states.[4] Therefore, the purpose of this study is to examine the enforcement provisions of all the open meetings statutes, the number of times the laws have been enforced, and the remedies being used in the state courts to enforce the laws.

The analysis of the enforcement provisions of the sunshine laws is limited to their 1991 versions. All state sunshine laws were examined and then Shepardized to find court decisions enforcing and interpreting them. In addition, a computer key-term search was used to ensure that all reported cases had been found.[5] Since most state lower court opinions are not reported, this study only includes state appellate courts decisions interpreting sunshine laws, including those under statutes that have since been rewritten.

Findings

I. Statutory Remedies

Statutes provide for five general categories of enforcement: punishment of officials, punishment of agencies, remedies forcing agency compliance, declaratory judgement, and unspecified remedies (see tables 1 and 2).

4E.g., "Invalidation as a Remedy for Violation of Open Meeting Statutes: Is the Cure Worse than the Disease?" W. Richard Fossey and Peggy Alayne Roston. 1986 U.S.F. L. Rev. 163 (Winter).

[5]Among the terms used for the computer search were "open or public meetings or proceedings within five words of violation" and "sunshine law within five words of violation." The statute number, particularly the penalty or enforcement section, was also used to find cases.

Statutes punishing a public official provide for removal from office and criminal and civil fines. Thirty-two states provide for this kind of direct punishment. Of those 32 states, 16 prescribe criminal fines,[6] seventeen prescribe civil fines,[7] and seven allow for removal from office. Only Florida prescribed all three punishments.

Statutes punishing the agency allow for attorney's fees[8] to be issued against agencies found in violation of the sunshine law. Invalidation of actions taken at illegally held meetings is also a punishment of an agency.[9] Twenty-eight states allow for an award of attorney's fees, to be paid by the agency, if a court finds that a meeting was held illegally. Thirty-seven states prescribe invalidation.

Statutes providing remedies to force agency compliance

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[6]Most statutes with criminal provisions classify willful or intentional violations as misdemeanors, carrying fines from $100 to $1,000 and jail sentences from one to six months or a combination of both.

[7]Civil fines range from $10 to $500. Only Maine, Ohio, and Wisconsin made the public body liable for civil penalties.

[8]Attorney fees and/or court costs are assessed to the violator of the sunshine law if the party bringing the suit prevails. Only Missouri's sunshine law states that if a member of a governmental body purposely violates the sunshine law, he or she may be ordered to pay attorney's fees and costs.

[9]A statute providing for invalidation permits nullifying or voiding any action that takes place in a meeting that violates the law. This study did not distinguish between statues mandating invalidation or those that provided the court with the option of invalidation.

prescribe equitable remedies such as injunctions[10] or writs of mandamus.[11] Thirty-two states provide for an injunction as a remedy to stop government officials from closing meetings and 12 states provide for writs of mandamus. Eleven statutes allow for declaratory judgments,[12] which neither punish a public official or the agency nor force agency compliance with the sunshine law, but merely assert that an official meeting should be open.

While 14 states provide for unspecified equitable remedies along with punishment against officials or agencies, or even with remedies forcing agency compliance, only North Dakota's sunshine law provides unspecified remedies as its only enforcement tool.

II. Enforcement and Remedies' Overview

The prosecution of officials for sunshine violations was upheld in 119 state appellate court cases in the 50 states and the District of Columbia from 1956 to 1991. The number does not, of course, reflect the total number of prosecutions because trial court cases were not part of the study. Even so, an average of a little more than two prosecutions per state during a 35 year period suggests less than a vigorous enforcement of sunshine

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[10]An injunction is an equitable remedy that prohibits or permits a specific behavior. Persons violating an injunction can be held in civil contempt of court.

[11]Writs of mandamus are issued from one court to a lower one or to a municipal corporation to restore a right that has been illegally deprived. If a public body violates a writ of mandamus it can be held in civil contempt.

[12]A declaratory judgment declares a violation has occurred, but provides no other remedy.

laws.

Detecting violations of open meetings laws can be difficult since few people may know about meetings held in secret. Even if secret meetings are known to have taken place, it may be difficult to determine whether business discussed in secret meetings violated state law. Non-journalists may have a particularly difficult time spotting secret meetings since the average citizen does not track local government carefully and does not have the expertise to know what constitutes appropriate notice. However, even if secret meetings are brought to the attention of local officials, a prosecution may not result, perhaps because prosecuting attorneys have not been particularly aggressive at filing charges against fellow public officials.

One-third of the 119 cases in which courts affirmed prosecutions (40 cases) were decided in five years -- 1976, 1979, 1981, 1983, and 1989 (see table 3). Only Florida, New Jersey, and New York experienced prosecutory activity that reached the double digits (17, 11, and 10 respectively). On the other hand, 13 states experienced no prosecutory activity at all, and in 24 states only one or two cases were decided during this 35 year period (see table 4).

Some of the most common violations of sunshine statutes are (1) holding secret meetings;[13] (2) breaking down a public body

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[13]E.g., Giordano v. Freedom of Information Commission, 413 A.2d 493 (Conn. Super. Ct. 1979); Board of County Commissioners of St. Joseph County v. Tinkham, 491 N.E.2d 578 (Ind. Ct. App. 1986).

into subgroups to circumvent the law;[14] (3) not giving appropriate notice to the public;[15] and (4) claiming that a meeting was not for the purpose of making a decision.[16]

In the 119 cases in which courts found meetings to be illegally closed, the courts provided 145 remedies. Of those remedies, 40 were invalidations, 24 were declaratory judgments, 20 were attorney's fees, 34 were injunctions, five were mandamus, six were civil penalties, two were criminal fines, one case involved an official's removal from office, and in 13 cases other kinds of remedies were provided.

III. Violations of Sunshine Laws: Courts' Enforcement

State appellate courts have used invalidation more than any other remedy -- 40 times. In IDS Properties v. Town of Palm Beach,[17] a Florida appellate court invalidated a zoning plan. The Palm Beach town's council had created an advisory committee to make recommendations regarding the town's development. The committee neither gave notice of its meetings nor took minutes.

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[14]See, e.g., Nigro v. Conservation Commission of Canton, 458 N.E.2d 1219 (Mass. App. Ct. 1984); Cherokee Jr. High School Parent-Teacher Association v. The School Board of Orange County, 375 So.2d 578 (Fla. Dist. Ct. App. 1979).

[15]E.g., Carefree Improvement Association v. City of Scottsdale, 649 P.2d 985 (Ariz. Ct. App. 1982); Channel 10 v. Independent School District No. 709, 215 N.W.2d 814 (Minn. 1974).

[16]See, e.g., Wolfson v. State of Florida, 344 So.2d 611 (Fla. Dist. Ct. App. 1977)

[17]279 So.2d 353 (Fla. Dist. Ct. App. 1973); aff'd 296 So.2d 473 (Fla. 1974).

Once a comprehensive zoning plan was developed, the town council held public hearings and approved the zoning plan. The court found that although the zoning plan was "born" in the sunshine, the "conception" took place in the dark. It was not possible, said the court, to allow a zoning plan that would mold the future development of a town to be valid when the deliberations that led to such plan were made in violation of the sunshine law. The court reasoned that the public had a right to be present in every step of the decision-making process if the sunshine law was to have any meaning.

Injunctions were the second most used remedy -- 34 times. Most courts used this remedy to prohibit government bodies from violating the sunshine laws. In The News and Observer v. Interim Board of Education for Wake County,[18] a North Carolina appellate court said that a school board could not evade the sunshine law by "resolving itself into a committee." The Wake County School Board commissioners wanted to fill a board vacancy. The Board's legal counsel advised them that in order to evaluate the applicants in executive session, the Board had to name a committee. Once the commissioners appointed to the committee decided on a candidate the meeting was opened and votes were recorded by secret ballot. The court found that the violation of the sunshine law was willful, and to prevent the board from excluding the public from future meetings and voting in secret, the court issued an injunction.

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[18]223 S.E.2d 580 (N.C. Ct. App. 1976).

Declaratory judgment was the third most used remedy in cases heard by appellate courts -- 24 times. In Binghamton Press Company v. Board of Education of Binghamton,[19] a New York appellate court held that school board members could not hold closed meetings under the guise of "work sessions." Two reporters who were excluded from the meetings asked the court to declare that the work sessions were meetings, as defined by the sunshine law. The court agreed and found that the major topic of discussion at the alleged work sessions was a proposed consolidation of two city high schools; a subject of substantial public interest.

The court awarded attorney's fees in 20 cases, usually along with other remedies. In an Alaska case, the Supreme Court of Alaska invalidated an action taken by the Anchorage Municipal Assembly and remanded the case to a lower court for determination of an award of attorney's fees. In Brookwood Area Homeowners Association, Inc. v. Municipality of Anchorage, a quorum of the municipal assembly met privately with members of the Quadrant Development Company to discuss an application for rezoning at the developer's office. The application for rezoning, which was scheduled for a public hearing one week after the private meeting, was approved despite the municipal planning and zoning commission's recommendation to the contrary. A group of homeowners challenged the municipal assembly's decision, claiming that the rezoning ordinance should be voided because the meeting

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[19]67 A.D.2d 797 (1979).

with the developer had violated the sunshine law. While the trial court held that the public hearing had cured the violation of the sunshine law, the Supreme Court disagreed and reversed the trial court's decision.[20]

Illinois and Montana were the only states in which appellate courts affirmed, or reversed lower courts' denial of, writs of mandamus.[21] In Hopf v. Barger,[22] an Illinois appellate court issued a writ of mandamus requiring that the city council comply with the sunshine law. In this case, the council had excluded the public from meetings dealing with annexation and zoning of property. Montana v. County of Yellowstone[23] involved telephone deliberations by the Yellowstone county commission that excluded the public. The court invalidated the action taken by the commission. Even though a writ of mandamus was not specifically authorized by the sunshine statute, the court issued the writ because it found that in the "interest of ... liberal construction" it was an adequate remedy.

State Courts awarded civil penalties in only six cases. In a Kansas case, the Kansas Supreme Court assessed costs and

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[20]Brookwood Area Homeowners Association, Inc v. Municipality of Anchorage, 702 P.2d 1317 (Alaska 1985).

[21]A writ of mandamus is different from a declaratory judgement in that if violated, a government body can be held in civil contempt, which could carry a fine and/or prison punishment. The declaratory judgement provides no remedy except declaring that a violation has occurred.

[22]332 N.W.2d 649 (Ill. Ct. App. 1975).

[23]606 P.2d 1069 (Mont. 1980).

imposed fines that ranged from $10 to $30. In Murray v. Palmgren[24] three county commissioners and three hospital trustees sought to hire a new administrator for the county hospital. The meetings with the prospective administrator were held in secret. The Kansas Supreme Court found that the meetings were (1) prearranged; (2) not open to the public; (3) held for the purpose of discussing public business; and (4) attended by a majority of two governmental groups.

In The Kansas City Star v. Shields,[25] a council chairman, who set up a meeting, was fined $100 plus costs for a violation to the sunshine law. Several city council members had met in a restaurant to discuss the city budget and evaluate city expenditures. A Missouri appellate court said that meetings had to be held at places and times that were reasonably convenient to the public and that proper notice had to be given.

In New York, an appeals court found county legislators in violation of an order that directed them to comply with the sunshine law. The officials claimed to have met in an executive session authorized by the statute to discuss pending litigation and the credit history of an individual. The court, however, found that the subjects discussed in the executive session were only "thinly" related to the statutory exemption and issued a

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[24]646 P.2d 1091 (Kan. 1982).

[25]771 S.W.2d 101 (Mo. Ct. App. 1989).

declaratory judgment, a $250 fine, plus attorney's fees.[26]

Only two state courts -- Oklahoma and Florida -- used criminal remedies for sunshine law violations. For example, a Florida appellate court found that a Lake Wales city commissioner willfully and knowingly violated the sunshine law by holding meetings regarding the employment of a city attorney that were not open to the public at all times. The city commissioner claimed that no official act had taken place at the secret meeting. The court, however, said that the purpose of the sunshine law was to prevent the "crystallization" of decisions in non public meetings. The court emphasized that the statute was to be construed to frustrate all evasive tactics.[27]

Even though seven states have removal-from-office provisions, only one appellate court has applied such a remedy. In Willison v. Pine Point Experimental School,[28] a Minnesota appeals court found that six school board members had violated the sunshine law several times by holding closed meetings. During one of the closed meetings, the school board members voted to terminate three teachers. The court held that the meetings had been illegally closed because the matters discussed were not exempted from the sunshine law. In remanding the case, the

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[26]Orange County Publications v. County of Orange, 120 A.D.2d 596 (1986).

[27]Wolfson v. State of Florida, 344 So.2d 611 (Fla. Dist. Ct. App. 1977), citing Town of Palm Beach v. Gradison, 222 So.2d 470 (Fla. Dist. Ct. App. 1969).

[28]464 N.W.2d 742 (Minn. Ct. App. 1990).

appeals court ordered the trial court to determine whether the violations were intentional. If so, the school board members were to be removed from office, as provided by the statute.

Conclusions

Most state sunshine laws have more than one enforcement remedy. Therefore, most statutes may appear strong enough to deter violation. Upon closer examination, however, some of the remedies may not be strong enough. For instance invalidating actions taken out of the sunshine as a remedy is more disruptive than punitive. Likewise, the award of attorney's fees or court costs hurts the pocket of the taxpayer. Punishment of officials, such as criminal penalties and removal from office, would probably be more effective enforcement tools because they would directly punish the violator and act as a deterrent.

Prosecutions are also a critical part of enforcing sunshine laws. In 35 years, state appellate courts affirmed prosecutions in only 119 cases. This may be due to several reasons. Many violations may go undetected, prosecutors may not be aggressive enough, or many cases may not reach the appellate level. Therefore, it is crucial that prosecutors bring violations to the courts and that the courts use the strongest remedies available to discourage secrecy.

The third important element for the successful enforcement of the sunshine laws is the role of the courts. At first glance 145 remedies in 119 cases may seem substantial. Nonetheless, the courts mostly used punishments against agencies -- invalidation, attorney's fees -- to punish sunshine law violation. The appellate courts frequent use of declaratory judgment did nothing to punish officials who violated the sunshine law, or to

encourage agency compliance.

It is difficult to know how effectively sunshine laws are being enforced without being able to track all trial court prosecutions. The fact that trial courts are not courts of record makes a review of all court cases involving sunshine violations extraordinarily difficult. Nevertheless, a study tracking sunshine cases at the trial court level would give scholars and journalists a better understanding of what needs to be done to improve enforcement.

Table 1: Statutory Remedies for Violation of Open Meeting Laws

State	Civil Pen.	Criminal Pen.	Inval.	Attorney/Ct. Fees/Costs	Inj.	Removal from Off.	Mand.	Decl. Judg.	Other~
AL	-	Y	Y*	-	-	-	-	-	-
ALK	-	-	Y**	-	-	-	-	-	-
ARZ	Y	-	-	Y	-	Y	-	-	Y
ARK	-	-	Y*	Y	-	Y	-	-	Y
CAL	-	Y	-	Y	Y	-	Y	Y	-
COL	-	-	Y**	-	Y	-	-	-	-
CON	-	Y	-	-	-	-	-	-	-
DC	-	-	Y*	-	-	-	-	-	-
DEL	-	-	Y*	Y	Y	-	Y	Y	Y
FL	Y	Y	Y**	Y	Y	Y	-	Y	-
GA	-	Y	-	Y	Y	-	-	-	Y
HI	-	Y	Y*	Y	Y	Y	-	-	Y
IDA	-	-	Y**	-	-	-	-	-	-
ILL	-	-	Y*	Y	Y	-	Y	-	-
IND	-	-	Y*	Y	Y	-	-	Y	-
IOWA	Y	-	Y**	Y	Y	Y	-	-	Y
KS	Y	-	Y*	-	Y	-	Y	-	-
KY	Y	-	-	-	-	-	-	-	-
LA	Y	-	Y*	Y	Y	-	Y	Y	-
ME	Y	-	-	-	-	-	-	-	-
MD	-	-	Y*	Y	Y	-	-	-	Y
MASS	-	-	Y*	-	-	-	-	-	-
MICH	Y	Y	Y*	Y	Y	-	Y	-	Y
MINN	Y	-	-	-	-	Y	-	-	-
MISS	-	-	-	-	Y	-	Y	-	-
MO	Y	-	Y**	Y	-	-	-	-	-
MON	-	-	Y*	Y	-	-	-	-	-
NEB	-	Y	Y+	Y	-	-	-	-	Y
NEV	-	Y	Y**	Y	Y	-	-	-	-
NH	-	-	Y*	Y	Y	-	-	-	-
NJ	Y	-	-	-	Y	-	-	-	-
NM	-	Y	Y**	Y	Y	-	Y	-	Y
NY	-	-	Y*	Y	Y	-	-	Y	-
NC	-	-	Y*	Y	Y	-	-	Y	-
ND	-	-	-	-	-	-	-	-	Y
OH	Y	-	Y**	Y	Y	Y	-	-	-
OK	-	Y	Y*	-	-	-	-	-	-
OR	-	-	Y*	Y	-	-	-	-	Y
PA	Y	-	Y*	-	Y	-	-	Y	-
RI	Y	-	Y*	-	Y	-	-	-	-
SC	-	Y	-	-	Y	-	-	Y	Y
SD	-	Y	-	-	-	-	-	-	-
TN	-	-	Y**	-	Y	-	-	-	-
TX	-	Y	Y*	Y	Y	-	Y	-	-
UTAH	-	-	Y*	Y	Y	-	-	-	Y
VT	-	Y	-	-	Y	-	-	Y	-
VA	Y	-	-	Y	Y	-	Y	-	-
WASH	Y	-	Y**	Y	Y	-	Y	-	-
WV	-	Y	Y*	-	Y	-	-	-	-
WIS	Y	-	Y*	Y	Y	-	Y	Y	Y
WY	-	-	Y*	-	-	-	-	-	-

* voidable

** automatically null and void when meeting violates the statute

\+ null and void if in violation of statute; voidable if in partial compliance with statute

~ include general references to unspecified equitable remedies. In the case of Iowa, the statute allowed for an award of damages of up to $500.

Table 2: Classification by Enforcement Provision

Punishment of Officials			Punishment of Agencies		Remedy Forcing Agency Compliance		DJ	Other
RFO	Crim. F.	Civ. F.	Fees	Inv.	Inj.	Mand.		
ARZ	AL	ARZ	ARZ	AL	CAL	CAL	CAL	ARZ
ARK	CAL	FLA	ARK	ALK	COL	DEL	DEL	ARK
FLA	CON	IOWA	CAL	ARK	DEL	ILL	FLA	DEL
HI	FLA	KS	DEL	COL	FLA	KS	IND	GA
IOWA	GA	KY	FLA	DC	GA	LA	LA	HI
MIN	HI	LA	GA	DEL	HI	MICH	NY	IOWA
OH	MICH	ME	HI	FLA	ILL	MISS	NC	MD
	NEB	MICH	ILL	HI	IND	NM	PA	MICH
	NEV	MIN	IND	IDAHO	IOWA	TX	SC	NEB
	NM	MO	IOWA	ILL	KS	VA	VT	NM
	OK	NJ	LA	IND	LA	WA	WIS	ND
	SC	OH	MD	IOWA	MD	WIS		OR
	SD	PA	MICH	KS	MICH			SC
	TX	RI	MO	LA	MISS			UTAH
	VT	VA	MON	MD	NEV			WIS
	WV	WA	NEB	MASS	NH			
		WIS	NEV	MICH	NJ			
			NH	MO	NM			
			NM	MON	NY			
			NY	NEB	NC			
			NC	NEV	OH			
			OH	NH	PA			
			OR	NM	RI			
			TX	NY	SC			
			UTAH	NC	TN			
			VA	OH	TX			
			WA	OK	UTAH			
			WIS	OR	VT			
				PA	VA			
				RI	WA			
				TN	WV			
				TX	WIS			
				UTAH				
				WA				
				WV				
				WIS				
				WYO				

RFO: Removal From Office
Inv.: Invalidation
Inj.: Injunction
Mand.: Mandamus
DJ: Declaratorty Judgement

Table 3: Years in Which Cases Were Decided by State Courts

STATE	YEARS	TOTAL
ALA	1979, 1984	2
ALK	1983, 1985	2
ARZ	1982, 1988	2
ARK	1968, 1975, 1977, 1989	4
CAL	1968, 1981	2
COL	1974, 1976, 1983	3
CON	1974, 1979	2
DEL	1977, 1984	2
FLA	1969 (2), 1970, 1973 (3), 1974 (2), 1977, 1979 (2), 1982, 1983 (2), 1987, 1988, 1989	17
ILL	1975, 1980, 1981, 1991	4
IND	1982, 1986, 1988, 1990 (2)	5
IOWA	1980	1
KS	1982	1
KY	1977, 1979	2
LA	1973, 1978, 1987	3
MAINE	1988	1
MASS	1981, 1984 1985	3
MICH	1978, 1981, 1984, 1983, 1990	5
MIN	1967, 1974, 1983, 1989, 1991	5
MISS	1985, 1989	2
MO	1984, 1989	2
MON	1980, 1983	2
NEB	1984	1
NEV	1987	1
NH	1976	1
NJ	1963, 1967, 1976, 1977 (2), 1978 (2) 1979, 1984, 1986 (2)	11
NY	1978, 1979, 1980, 1981 (2), 1982, 1983 1986, 1988, 1990	10
NC	1976, 1983	2
ND	1956, 1976	2
OH	1978, 1988 (2)	3
OK	1981 (3)	3
OR	1989	1
PA	1980	1
SC	1989	1
TN	1976	1
TX	1971, 1980, 1988, 1990, 1991	5
WASH	1975, 1989	2
WIS	1976, 1979	2
TOTAL NUMBER OF CASES PROSECUTED FROM 1956 TO 1991		119

Table 4: Enforcement of Open Meeting Statutes*+

State	Civil Pen.	Crim. Pen.	Inv.	At./Ct. Fees/Costs	Inj.	RFO	Mand.	DJ	Other~	No. of Cases
AL	-	-	-	-	2	-	-	-	-	2
ALK	-	-	2	1	-	-	-	-	-	2
ARZ	-	-	2	2	-	-	-	-	-	2
ARK	-	-	-	-	-	-	-	4	-	4
CAL	-	-	-	1	1	-	-	1	-	2
COL	-	-	1	-	1	-	-	1	-	3
CON	-	-	-	-	1	-	-	-	1	2
DC	-	-	-	-	-	-	-	-	-	-
DEL	-	-	-	-	-	-	-	2	-	2
FLA	-	1	3	1	9	-	-	2	2	17
GA	-	-	-	-	-	-	-	-	-	-
HI	-	-	-	-	-	-	-	-	-	-
IDA	-	-	-	-	-	-	-	-	-	-
ILL	-	-	-	-	1	-	2	2	-	4
IND	-	-	1	1	3	-	-	-	2	5
IOWA	-	-	-	1	-	-	-	-	-	1
KS	1	-	-	-	-	-	-	-	-	1
KY	-	-	2	-	1	-	-	-	-	2
LA	-	-	1	-	-	-	1	-	1	3
ME	-	-	-	-	-	-	-	1	-	1
MD	-	-	-	-	-	-	-	-	-	-
MASS	-	-	1	-	-	-	-	1	2	3
MICH	-	-	-	3	1	-	-	4	-	5
MINN	1	-	1	-	2	1^	-	-	1	5
MISS	1	-	-	1	2	-	-	-	-	2
MO	1	-	-	1	1	-	-	-	-	2
MON	-	-	2	1	-	-	1	-	-	2
NEB	-	-	1	1	-	-	-	-	-	1
NEV	-	-	-	-	1	-	-	-	-	1
NH	-	-	-	1	-	-	-	-	-	1
NJ	-	-	9	-	2	-	-	-	-	11
NM	-	-	-	-	-	-	-	-	-	-
NY	1	-	3	2	1	-	-	4	1	10
NC	-	-	-	-	2	-	-	-	-	2
ND	-	-	2	-	1	-	-	-	-	2
OH	-	-	1	-	2	-	-	1	-	3
OK	-	1	2	-	-	-	-	-	-	3
OR	-	-	-	-	-	-	-	-	1	1
PA	-	-	1	-	-	-	-	-	-	1
RI	-	-	-	-	-	-	-	-	-	-
SC	-	-	-	1	-	-	-	-	-	1
SD	-	-	-	-	-	-	-	-	-	-
TN	-	-	1	-	-	-	-	-	-	1
TX	-	-	4	1	-	-	1	-	-	5
UTAH	-	-	-	-	-	-	-	-	-	-
VT	-	-	-	-	-	-	-	-	-	-
VA	-	-	-	-	-	-	-	-	-	-
WASH	-	-	-	-	-	-	-	-	2	2
WV	-	-	-	-	-	-	-	-	-	-
WIS	1	-	-	1	-	-	-	1	-	2
WY	-	-	-	-	-	-	-	-	-	-
TOTAL NUMBER OF CASES PROSECUTED IN ALL STATES										119
TOTAL NUMBER OF REMEDIES										145

*In some cases the courts awarded more than one remedy per case
+Only state appeal and supreme court cases were used
^Appeals court remanded case to determine if three or more violations were intentional, thus requiring removal from office. Willison v. Pine Point Exp. School, 464 N.W.2d 742 (1990).
~Included general references to unspecified equitable remedies.

A content analysis of pre-trial crime news stories' violations of the American Bar Association's fair trial-free press guidelines.

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It is generally recognized that, as Justice Tom C. Clark put it in the majority opinion in the Sheppard case in 1966, "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[1]

The Billie Sol Estes case, the Sam Sheppard case, and the Warren Commission's report on the assassination of President John F. Kennedy helped spur the American Bar Association's attempt, in the mid-1960s, to regulate prejudicial publicity.

Standards Relating to Fair Trial and Free Press were adopted by the ABA in 1968 following the Reardon Report, providing "the first comprehensive guidelines for the types of non-prejudicial information that could be released for publication prior to a trial and the types of information that should not be released."[2]

About half the states adopted voluntary agreements based on conferences among judges, lawyers, and media representatives.[3] It was usually agreed that the type of information that should not be published included: confessions or admissions attributed to the defendant; opinions about the accused's guilt or innocence; the results of lie-detector tests or the refusal of the accused to take such tests; and statements concerning the credibility of propective witnesses.[4]

Attempts to determine the role of the voluntary guidelines in promoting responsible coverage of crime in the American press have usually rested on the opinions of a few expert observers or on sample

surveys of press and bar members, according to James W. Tankard et al. in a study titled "Compliance with American Bar Association Fair Trial-Free Press Guidelines" published in 1979. The Tankard study reports that earlier research indicated a consensus that the agreements "were working reasonably well."[5] However, it found a tendency for violations to occur more frequently in newspapers from states with press-bar gudelines than in newspapers from states without them.

Much research has been conducted into trial and pre-trial media "effects," but there is a dearth of research into violations of the press-bar guidelines. This study, largely replicating the 1976 study by Tankard et al., will attempt to contribute to the press-bar guideline violations research.

Literature Review:

While there are countless studies related to fair trial-free press in terms of prejudicial press coverage and the impact of media information on potential jurors the only "compliance"-related study is that by Tankard et al. This literature review will briefly outline fair trial-free press-related studies as a necessary corollary to the "compliance" issue.

The conflict between First Amendment and Sixth Amendment rights has been traced to about 200 years ago when "out-of-court statements which might jeopardize a fair trial" seemingly first became an issue of concern to the judiciary.[6] It was not until the 1920s, however, when yellow journalism was at its peak, that "the American Bar

Association approached the newly formed American Society of Newspaper Editors, and suggested the press and the bar cooperate in an attempt to find solutions to mutual problems."[7] The stage was set for the eventual development of the ABA press-bar guidelines.

However, in the 1950s and 1960s, some of the first studies were undertaken to examine the effect of pre-trial and trial publicity on jurors, among them, that by Donald M. Gillmore,[8] and the Chicago Jury Project,[9] conducted by Kalven and Zeisel of the University of Chicago Law School in order to develop a theory by whch prejudicial pre-trial crime news could be recognized. In the early '70s, a study to determine the media's impact on jurors (especially in relation to voir dire) was conducted by Alice M. Padawar-Singer and Allen H. Barton, director of the Bureau of Applied Social Research at Columbia University.[10]

The Gillmore study pointed out that the free press-fair trial conflict would remain "an issue of passionate speculation" until such time as the legal profession collaborated with behavioral scientists to solve the pre-trial publicity problem.[11]

A study by Goggin and Hanover to assess the psychological effects of pre-trial publicity on jurors' ability to be impartial, determined that the public consider the media reliable, are usually resistant to changing their views, and quickly form beliefs when a threat to society is perceived, i.e., when an accusation of guilt exists against a defendant.[12]

Kalven and Zeisel found from their 1954-'55 and 1958 studies of 3,576 jury trials reported by 555 trial judges that there is no

evidence of affective pre-trial elements and that, "with the exception of criminal record, the data, in particular the judges' comments, concern the attitudinal mix developed during the trial"[13] and not before. This study created uproar when it was discovered that the secrecy of juror deliberations had been violated.

The Barton-Singer study, controversial because of the simulated trial tapes used and because of other distortions, found, nonetheless, that prejudicial news reports, even when printed or broadcast only once, are considered in jury deliberations.[14]

Even elements such as defendant attractiveness can affect the jurors' decision: Mary Connors, in her assessment of prejudicial publicity, refers to Friend and Vinson's study of the impact of defendant attractiveness which indicated that jurors tend to give heavier sentences to those whom they find attractive or deem "neutral," in order to compensate for their own biases.[15]

Kline and Jess' study into the effect of prejudicial publicity in a civil case on law school mock juries found that in each of four trials, at least one member of the "prejudiced" jury made reference to information contained in the news stories and one of four juries actually used the information in deliberations.[16]

Tans and Chaffee showed that jurors do pre-judge on the basis of news stories, and that the more unfavorable the publicity, the more likely is the suspect to be judged guilty and vice versa.[17]

Sohn, in a study of whether newspaper readers related the kind of crime, the commonness of the accused's name, and the penalty for conviction to belief in the guilt or innocence of the accused, found

that some people are likely to assume the accused in a pre-trial news story is more guilty than innocent if s/he is charged with a felony rather than with a misdemeanor.[18] The other elements have almost no effect.

Drechsel et al., relating community size to newspaper reportage of local courts, found that in communities of all sizes, civil trials are more likely to get balanced coverage than are criminal trials.[19] In his study of judges' perceptions of fair trial-free press, Drechsel found that judges do not consider interference with fair trial by newspaper reporting to be a major problem. What he did find was that they are "far more concerned about ignorant, inaccurate, biased or sensational reporting."[20] Hale, in a study of how reporters and justices view coverage of a state appellate court, found that reporters thought coverage was as good as that of other governmental processes and that justices were satisfied, but justices disagreed.[21]

More recently, Pritchard has pointed out that what is generally overlooked in the fair trial-free press debate, is "the fact that as many as 90 percent of all criminal convictions in the United States are the result of plea bargaining rather than full-blown adversary trials. His study of Milwaukee prosecutors found that newspaper space was a greater indicator than any other as to prosecutors' willingness to plea bargain.[22] Of special interest in his study are his suggestions for future research, i.e., information about offers and counter-offers in negotiations, and the influence of prosecutors and other law enforcement officers on newspapers' decisions about what

cases to cover and how to cover them.

Specifically relevant to the Reardon Report and its impact is the 1970s study by Gerald which found that newspapers reaching 90 percent of the sample considered the report had little effect and that prosecutors serving only 8 percent of the sample said they read or heard prejudicial news.[23]

Sheldon et al., however, in 1988, wrote that given the mistrust of press and bar personnel for each other, and their divergent professional commitments, it is surprising that the voluntary guidelines continue to be viewed positively. The writers found that journalists become increasingly concerned about individual privacy the more familiar they become with the guidelines, and that defense attorneys, "who tend to hold a negative view regarding the principles,"[24] attribute more weight to the free press at the expense of fair trial as they become more experienced. Judges are at center stage.

Ultimately, however, the impact of the free press-fair trial debate should be of greatest significance to the accuseds. Yet, in a Missouri-based study, those most affected by the trial process, i.e., the defendants, said they did not get a fair trial. The culprits: their defense attorneys; not the prosecutors, not the jurors, not the judges, and not the press![25]

Largely replicating the work of Tankard et al., this study attempts to gauge the effect of the press-bar guidelines on the reporting of pre-trial crime news stories by looking for incidents of guideline violations. Content analysis is used to determine the rate

of violation and to compare the rate across states with and without guidelines. Attempts are made also to relate violations to other variables such as the sensationalism of the stories, racial identification of the accused, and whether sources are named. As in the Tankard study, the hypotheses examined were:

H1: Violation of ABA guidelines will occur more frequently in states without voluntary press-bar agreements than in states with agreements.

H2: Sensational crimes are more likely to be reported with violations of ABA guidelines than non-sensational crimes.

H3: In pre-trial stories in which the race of the accused is identified minority group suspects are more likely to be reported with violations of ABA guidelines than are white suspects.

H4: Sources of news about a suspect are less likely to be named when guidelines are violated than they are when guidelines are not violated.

Methodology:

Pre-trial crime news reporting was examined in a convenience sample of ten newspapers -- five newspapers from states with press-bar guidelines and five from states without guidelines. The newspapers ranged in daily circulation from 200,000 to more than one million.[26] The sample was from Monday, Jan. 20, through Sunday, Feb. 2, 1992. A total of 140 newspapers were examined. Sampling of stories was from pages 1 through 3 in the front sections of all newspapers; from the state and metro sections; and, in the case of the tabloids, which

appeared to have no precise state/metro sections, from throughout the newspaper.

A pre-trial crime news story was defined, as in the Tankard study, as "a news story dealing primarily with a specific person (identified by name) who has been charged with a crime or who is under investigation by police."[27] Stories with foreign datelines, trial stories, and civil suits were omitted from the study. News stories were defined as all types of stories from news briefs to long stories up to even one or more pages. The pre-trial phase included proceedings from the preliminary hearing or a grand jury indictment to arraignment, plea bargaining, and pre-sentencing investigation,through the filing of motions. Each issue was examined and each story was coded by the author. The categories of the types of violations were: (1) opinions about the accused's character, guilt or innocence; (2) admissions, confessions, or the contents of a statement attributed to the accused, except in the case of a lawyer announcing that the accused denies the charges; (3) references to the results of any examination or tests, such as fingerprint tests, polygraphs, ballistics or laboratory tests; (4) statements pertaining to the credibility or anticipated testimony of prospective witnesss; (5) opinions concerning evidence or argument in the case, and whether it was expected that such evidence or argument would be presented at trial, and (6) details of prior criminal charges or convictions. The nature of the crime was categorized according to sensationalism or non-sensationalism. A crime was considered to be sensational if it involved murder or sex and carried at least an 18-point headline.

Coding was also done for race and source identification.

Results:

Of the 231 stories examined, 94 of them were from newspapers in states with press-bar guidelines; 137 of them were from newspapers in states without guidelines. One hundred and twenty-one stories, or 52 percent, contained at least one violation of an ABA guideline; 110 stories (48 percent) contained no violations. Forty-seven stories or 20 percent contained one violation and 54 stories or 23 percent contained two violations (Table 1). This contrasts with Tankard's findings of no violations in 32 percent of stories; one violation in 39 percent and two violations in 16 percent.

TABLE 1

Percentages of stories containing various numbers of guidelines violated.

Number of guidelines	Number of stories	Percentages of stories
0	110	48.00%
1	47	20.34
2	54	23.37
3	13	5.62
4	7	3.03
5	0	0
6	0	0
	n = 231	100.00%

The guideline violated most frequently was that pertaining to opinions about the accused's character, guilt or innocence (in 30 percent of the stories) while the guideline violated least frequently (in 2.5 percent of stories) was that of statements concerning the credibility or anticipated testimony of witnesses, followed closely by the guideline (in only 4.5 percent of stories) pertaining to results of polygraph, fingerprint and other tests (Table 2). This result is somewhat similar to Tankard's which found that 35 percent of stories contained opinions about the character, guilt or innocence of the accused, with the least frequently violated guideline, at 2.4 percent, being that of references to the results of lie-detector and other tests.

TABLE 2

Percentage of stories containing violations for each of the six press-bar guidelines.

Guideline #	# of stories with violations	Percentage of stories violating the guidelines
1	37	30.00%
2	13	11.0
3	5	4.5
4	3	2.5
5	35	29.0
6	28	23.0
	n = 121	100.00%

Hypothesis 1, which predicted that violations of ABA guidelines would occur more frequently in states without press-bar guidelines than in states with guidelines, was not supported. A cross-tabulation of whether a story violated any guideline by whether it was published in a state with a press-bar agreement proved statistically significant at the .05 level (Table 3). Hypothesis 2, which suggested that sensational crimes are more likely to be reported with violations was not supported as there was no statistical significance at the .05 level (Table 4). No support was found for Hypothesis 3, i.e., that minority group suspects are more likely to be reported with violations than are white suspects (Table 5). There were few instances -- only 21 -- of racial identification.

TABLE 3

Cross-tabulation of whether a story violated any guideline by whether it was published in a state with a press-bar agreement.

	No press-bar agreement	Press-bar agreement
No violation:	53.3%	39.4%
Violation:	46.7%	60.6%
	100.0%	100.0%
	(n = 137)	(n = 94)

$X^2 = 4.6$, d.f. = 1, $p < .05$

Hypothesis 4, which predicted that sources of news about a suspect are less likely to be named when guidelines are violated than when they are not, was not supported (Table 6).

TABLE 4

Cross-tabulation of whether a sensational crime story was more likely to be reported with violations of ABA guidelines than a non-sensational story.

	Stories with violations	Stories without violations
Sensational Crime Stories:	50%	51%
Non-sensational Crime Stories:	50%	49%
	100% (n = 94)	100% (n = 137)

$X^2 = .07$, d.f. = 1, N.S., p = .05

TABLE 5

Cross-tabulation of whether minority group suspects are more likely to be reported with violations of the guidelines than are white suspects.

	Stories with violations	Stories without violations
Minority ID.	75%	20%
White ID.	25%	80%
	100% (n = 16)	100% (n = 5)

$X^2 = 1.6$, d.f. = 1, N.S., p = .05

TABLE 6

Cross-tabulation of whether sources of news about a suspect are less likely to be named with violations than without.

	Stories with violations	Stories without violations
Sources Named:	62.2%	50.78%
Sources Not Named	37.8%	49.22%
	100.0%	100.0%
	(n = 53)	(n = 128)

$X^2 = 1.7$, d.f. = 1, N.S., p = .05.

A rank correlation of the findings of this study and of the Tankard et al. study in relation to the percentage of stories containing violations for each of the six guidelines is statistically not significant at the .05 level, with the Spearman rho of 0.56 (Table 7). It is likely then, that the guidelines most likely to be violated are (1) opinions regarding the character, guilt or innocence of the accused; (2) opinions about evidence and if such evidence is likely to be used in the trial; and (3) details of previous criminal charges and convictions.

Conclusions:

This content analysis of violations of press-bar guidelines in pre-trial crime news stories in newspapers from states with guidelines

TABLE 7

Rank correlation of the percentage of stories containing violations for each of the six ABA guidelines in the Tankard study and the present study.

Guideline #	Present study %	Tankard study %
1	30.0	35.3
2	11.0	12.0
3	4.5	12.6
4	2.5	24.0
5	29.0	25.1
6	23.0	12.6

$r = .56$, $p < .05$

and from states without the guidelines, shows that violations occur in 52 percent of all stories. Like the Tankard study which it somewhat replicates, this study supports the hypothesis that violations are more likely to occur in stories from newspapers with guidelines than from newspapers without. There is a significant difference in the rate of violations in stories from newspapers in states with guidelines and in states without them, i.e., a difference of approx. 13 percent.

Thirty percent of the stories violated the guideline against publishing opinions about the character of the accused; 29 percent, the guideline against opinions about evidence; and 23 percent, that against prior criminal charges. These rates of violations are relatively high -- the prior charges rate is almost double that of the rate found by Tankard et al. Such rates obviously raise questions

about editors' compliance with, and perhaps more appropriately, their awareness of the guidelines. Given that the guidelines were adopted by most newspapers in the 1960s-'70s, it is possible that both reporters and editors neither know if the state in which they work actually adopted the guidelines nor what types of information violate the guidelines. The sample period of this study had a few sensational national crime stories, i.e., the Wuornos prostitute-serial-killer story from Florida; the Tyson rape trial from Indiana; the Jeffrey Dahmer serial murder trial from Wisconsin; and the John Gotti murder and racketeering trial from New York. With the exception of actual pre-trial stories, none of these trial-related stories formed part of this study.

The lack of racial identification of the accused in crime news stories is noteworthy in so far that it makes race a non-issue in pre-trial crime news reports. Racial identification was pictorial in all but four stories from the sample studied.

Additional content analysis-based research into violations of press-bar agreements in pre-trial crime news stories could examine the effect of the guidelines on major sensational crime news stories such as those about Dahmer, Tyson, and Wuornos. Other possible studies could include a survey of reporters and editors to determine their awareness of, and knowledge about the guidelines, and a study of the role of different newspapers and bar associations in adopting the guidelines.

Notes:

1.Harold L. Nelson, Dwight L. Teeter, Jr., and Don R. Le Duc, Law of Mass Communications (New York, The Foundation Press, Inc., 1989), p. 493.

2.James W. Tankard, Jr., Kent Middleton and Tony Rimmer, "Compliance with American Bar Association Fair Trial-Free Press Guidelines," Journalism Quarterly , 56:464-68.

3.Nelson, Teeter and Le Duc., ibid., p. 498. See also Fair Trial/Free Press, Voluntary Agreements (The American Bar Association, Legal Advisory Committee on Fair Trial and Free Press). The handbook lists the states in which voluntary bar-bench-media agreements on fair trial-free press were adopted as of June 1974. They were: Arizona (1968); California (Statement of Principles, 1970); Colorado ('69); Idaho ('69); Kentucky ('70); Massachusetts ('63); Minnesota ('68); Missouri ('68); Nebraska ('70); New Jersey (Statement of Principles, '72); New Mexico ('69); New York ('69); North Carolina ('66); North Dakota ('71); Oklahoma ('68); Oregon ('62); Pennsylvania ('71); South Dakota ('71); Texas ('69); Utah ('69); Virginia ('71); Washington ('66), and Wisconsin ('70).

4.Protecting Two Vital Freedoms: Fair Trial and Free Press, A Report by the National News Council , p. 15.

5.Tankard et al., ibid.

6.James M. Jennings 11, "The Press, The Courts, And the Regulation of Prejudicial Publicity: A Historical Analysis of Attempts to Balance First Amendment and Sixth Amendment Rights," Ph.D. diss., Ohio University, Athens, 1983.

7.Freedom of Information Center Report No. 184, "Press-Bar Cooperation," School of Journalism, University of Missouri at Columbia, July 1967.

8. Donald M. Gillmore, "Free Press and Fair Trial: A Continuing Dialogue - Trial by Newspaper and the Social Sciences," North Dakota Law Review, 41:156-76 (1965), cited in Fred S. Siebert, Walter Wilcox and George Hough 111, eds., Free Press and Fair Trial, Some Dimensions of the Problem, (University of Georgia Press, Athens, 1970).

9.Harry Kalven, Jr., and Hans Zeisel, The American Jury, (Boston: Little, Brown, 1966), cited in Fred S. Siebert, Walter Wilcox, and George Hough 111, eds., Free Press and Fair Trial, Some Dimensions of the Problem, (University of Georgia Press, Athens, 1970).

10.Alice M. Padawar-Singer and Allen H. Barton, "The Impact of Pretrial Publicity on Jurors' Verdicts," cited in J. Edward Gerald, News of Crime, Courts and Press in Conflict, (Greenwood

Press, Westport, Ct., 1983).

11.Donald M. Gillmore, cited in Siebert et al., p. 75.

12.Terrence P. Goggin and George M. Hanover, "Fair Trial and Free Press: The Psychological Effect of Pretrial Publicity on the Juror's Ability to be Impartial: A Plea for Reform," cited in Gerald, News of Crime, (Greenwood Press, Westport, Ct., 1983).

13.Kalven and Zeisel, cited in Gerald, News of Crime, p. 55.

14.Padawar-Singer and Barton, cited in Gerald, News of Crime, p. 57.

15.R. M. Friend and M. Vinson, "Leaning Over Backwards: Jurors' Responses to Defendants' Attractiveness," Journal of Communication 24 (3), Summer 1974, cited in Mary M. Connors, "Prejudicial Publicity: An Assessment," Journalism Monographs, (Association for Education in Journalism and Mass Communication, 1975).

16.F. Gerald Kline and Paul H. Jess, "Prejudicial Publicity: Its Effect on Law School Mock Juries," Journalism Quarterly 43:113, Spring 1966.

17.Mary D. Tans and Steven H. Chaffee, "Pretrial Publicity and Juror Prejudice," Journalism Quarterly 43: 647, Winter 1966.

18.Ardyth Broadrick Sohn, "Determining Guilt or Innocence of Accused from Pretrial News Stories," Journalism Quarterly 53:100, Spring 1976.

19.Robert Drechsel, Kermit Netteburg and Bisi Aborisade, "Community Size and Newspaper Reporting of Local Courts," Journalism Quarterly 57:71-78, 1980.

20.Robert E. Drechsel, "Judges' Perceptions of Fair Trial-Free Press Issue," Journalism Quarterly 62:388-90.

21.F. Dennis Hale, "How Reporters and Justices View Coverage of a State Appellate Court," Journalism Quarterly, 52:106-110, Spring '75.

22.David Pritchard, "Homicide and Bargained Justice: The Agenda-Setting Effect of Crime News on Prosecutors," Public Opinion Quarterly, 50:143-159, 1986.

23.J. Edward Gerald, "Press-Bar Relationships: Progress Since Sheppard and Reardon," Journalism Quarterly 47:223, Summer 1970.

24.Charles H. Sheldon, Nicholas P. Lovrich, Val Limburg, and Erik Wasmann, "The effect of voluntary bench-bar-press guidelines on professional attitudes towards free press, privacy and fair trial values," Judicature 72:2, 114-121, August/September 1988.

25.R. G. Sherard, "Fair Press or trial prejudice? Perceptions of criminal defendants,"Journalism Quarterly 64(2/3):337-340, Summer/Autumn 1987.

26.The newspapers from states with press-bar guidelines were The Boston Globe, The Tampa Tribune, The New York Times, The Rocky Mountain News and The Richmond Times-Dispatch. Newspapers from states without guidelines were The Columbus Dispatch (Ohio), The Chicago Sun-Times, The Atlanta Constitution, The Charleston Gazette (West Virginia), and The Des Moines Register. Each of these newspapers has a daily circulation in excess of 200,000. The circulation of the Charleston Gazette was not available.

27.James W. Tankard et al., ibid.